

1984

# Uniform Commercial Code Annual Survey: General Provisions, Sales, Bulk Transfers, and Documents of Title

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## Recommended Citation

Fairfax Leary, Jr. & David Frisch, *Uniform Commercial Code Annual Survey: General Provisions, Sales, Bulk Transfers, and Documents of Title*, 39 Bus. Law. 1851 (1984).

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# Uniform Commercial Code Annual Survey: General Provisions, Sales, Bulk Transfers, and Documents of Title

By *Fairfax Leary, Jr.* and *David Frisch\**

On a number of issues arising under the Uniform Commercial Code (U.C.C. or Code), the courts have reached conflicting results, yet the number of jurisdictions passing on each such issue remains small. There is still time, then, for discussion of proper solutions of many of such Code issues. Of interest is the continuing judicial struggle with the intermesh of the Code's warranty provisions, the strict liability provisions of the Restatement Second of Torts, section 402A, and the burgeoning new crop of products liability statutes. The trend toward nuclear and computer problems is reflected in cases involving construction of nuclear plants, "heavy water" operations, and sales or leases of computers. The high interest rates of recent years have also resulted in litigation. All of the foregoing is reflected in the decisions covered by this review.

## GENERAL PROVISIONS

As conflicts in precedent develop, choice-of-law problems may arise with greater frequency than in the past. Two cases ruling on the effect of choice-of-law clauses have gone beyond the strict wording involved. In *Hammel v. Ziegler Financing Corp.*,<sup>1</sup> the court faced a usury problem when Wisconsin residents were sued over a mobile home park in Missouri. The contract language was that the obligations were "to be construed according to the law of Missouri."

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*Editor's note:* This article is a continuation of the survey of 1983 developments under the Uniform Commercial Code. Other sections of the survey appeared in the May 1984 issue of *The Business Lawyer*.

1. 334 N.W.2d 913, 36 U.C.C. Rep. Serv. (Callaghan) 1496 (1983).

The court properly ruled that the effect of this language was that the obligations were "to be construed according to the law of Missouri." The negotiations of the parties showed that their true intent was to have the clause govern only the interpretation of language. In *Northern States Power Co. v. International Telephone & Telegraph Corp.*,<sup>2</sup> the court refused to apply a clause providing that the contract was to be governed by New York law. The court felt that New York bore no "reasonable relation" to the contract, noting that the choice-of-law clause had not been the subject of negotiations between the parties. The statement was appropriate since U.C.C. section 1-105, in its formulation of choice of law rules, limits the application of a choice-of-law clause to the law of states "having a reasonable relation to the transaction."<sup>3</sup>

The inquiry into the intent of the parties was nevertheless appropriate. The U.C.C. espouses freedom of contract as one of its cardinal principles.<sup>4</sup> Thus on issues where the courts are divided as to the allocation of certain risks, a choice-of-law clause may effectuate an agreed contractual allocation of specific risks. This was not the case in *Northern States*. The issue was whether a disclaimer of consequential damages and a monetary limitation of liability survived when the court held that an exclusive limited remedy "failed of its essential purpose."<sup>5</sup> Under Minnesota law the disclaimer also failed. In New York the disclaimer survived. The selection of the state named in the choice-of-law clause could be considered a contractual allocation of the risk. But it should be so considered only if the choice-of-law clause had been negotiated for that purpose and the selected allocation, if expressly stated in the contract, would not have been repugnant to the law of the forum state.<sup>6</sup>

The foregoing principle of freedom of contract is not always applied. *Leasing Service Corp. v. Diamond Timber Inc.*,<sup>7</sup> involved an equipment lease between a New York corporation, as assignee, and a corporation located in the state of Washington. The court considered only the "intensity of contract that exists with Washington" and applied the law of Washington. The court felt that the fact that the assignee was a New York corporation would not satisfy even the

2. 550 F. Supp. 108, 35 U.C.C. Rep. Serv. (Callaghan) 1124 (D. Minn. 1983).

3. Absent a selection-of-law clause, the requirement is an "appropriate relation," thus bringing into the Code the "more significant contacts test" so dear to the hearts of devotees of the study of conflicts of laws. See, e.g., *Epprecht v. IBM Corp.*, \_\_\_\_ F. Supp. \_\_\_\_, 36 U.C.C. Rep. Serv. (Callaghan) 391 n.1 (E.D. Pa. 1983).

4. U.C.C. § 1-102(3) (1978) provides for freedom of contract except in the limited area of disclaimers of obligations of "good faith, diligence, reasonableness and care prescribed by this Act." Even in these areas, the parties are free to write their own rules for judging these vague areas, if the result is not judged to be "manifestly unreasonable."

5. U.C.C. § 2-719(2) (1978).

6. The result may be different if the law of the state named in the choice-of-law clause is repugnant to the laws of the forum state. Where the choice of Michigan law was made by the parties, who expressly included a clause shortening the time for bringing actions in their contract, the court in *Suntogs of Miami, Inc. v. Burroughs Corp.*, 433 So. 2d 581, 36 U.C.C. Rep. Serv. (Callaghan) 557 (Fla. Dist. Ct. App. 1983) refused to enforce the contractual shortening of the period in view of a non-Code statute (Fla. Stat. § 95.03 (1975) prohibiting such provisions.

7. 559 F. Supp. 972, 36 U.C.C. Rep. Serv. (Callaghan) 1075 (S.D.N.Y. 1983).

reasonable relation test.<sup>8</sup> There was no discussion of the parties' intent in including such a clause.

Counsel drafting a choice-of-law clause should be careful to express what is intended thereby. *Ontario Hydro v. Zallea Systems, Inc.*<sup>9</sup> involved a warranty claim regarding expansion joints sold for use in the construction of a "heavy water facility." The choice-of-law provision read, "A contract arising out of the acceptance of a tender shall be interpreted in accordance with the laws of Ontario."<sup>10</sup> Judge Latchum, in the district court of Delaware, ruled that this clause did not constitute a contractual agreement that the Ontario statute of limitations would apply even though the breach of warranty occurred upon a tender in Ontario. Further, the Delaware "borrowing statute" applied, and it stipulated that the proper statute of limitations was the shorter of either the Delaware statute or the statute of the state or country where the cause of action arose. Ontario's argument that a repair or replacement provision as an exclusive remedy was in effect a warranty extending to future performance did not prevail.

The doctrine of privity of contract is not dead in all states. It is alive and well in Georgia, raising its head in a diversity action in the relatively new eleventh circuit.<sup>11</sup> A Massachusetts company manufactured the fabric used by a Georgia company in producing tarpaulins sold to a trucking company with headquarters in Florida. The tarpaulins were supposedly made of waterproof fabric. They leaked, causing water damage to the goods being transported interstate by the trucker. The trucker, having paid claims for cargo damage and for repairs to the tarpaulins, refused to pay for a shipment of new tarps claiming they were substitutes for the defective ones.

Sued for the price by the seller, the fabric maker, Norton, (a party to the trucker's counterclaim) moved for dismissal on the ground that Georgia law governed the claim against it and under Georgia law direct privity was essential. The trucker argued that Florida law applied dispensing with privity. Unfortunately, the trucker had made an averment, to support ancillary jurisdiction, that his claim against the Massachusetts manufacturer was "brought in the jurisdiction [Georgia] where the cause of action arose." This was enough to secure a dismissal on the contract claims. The Georgia conflicts law of torts (The trucking company asserted a claim for strict liability in tort.) follows the "*lex loci delicti*" rule. However, no one knew in what state the injuries occurred.

8. The choice-of-law clause was unusual in that it provided that the applicable law was "the law of the state . . . of Lessee or Lessor [said assignee hereinafter called Lessor] or the original lessor," leaving the choice up in the air. *Id.* at 975, 36 U.C.C. Rep. Serv. at 1078. Hence, the court's discussion of the effect of the choice of law clause is only dicta.

9. \_\_\_\_ F. Supp. \_\_\_\_, 36 U.C.C. Rep. Serv. (Callaghan) 1222 (D. Del. 1983).

10. *Id.* at 1226.

11. *Best Canvas Prods. & Supplies, Inc. v. Ploof Truck Lines, Inc.*, 713 F.2d 618, 36 U.C.C. Rep. Serv. (Callaghan) 1175 (11th Cir. 1983).

Due to its inability to pick the place of injury, the court applied the law of Georgia where the tarps were fabricated.<sup>12</sup>

## **HYBRID SALES AND SERVICES CASES**

Whether article 2 should be applied to hybrid contracts involving a transfer of title to goods and the rendition of services continues to plague the courts in a variety of cases. One recent case involved the construction of a nuclear plant;<sup>13</sup> another the implanting of an inflatable mammary prosthesis.<sup>14</sup> Apparently neither worked as intended. The nuclear plant case involved the applicable statute of limitations; the issue in the other case was the existence and scope of liability for implied warranties.

In the prosthesis case, the doctor was held to be rendering a service primarily, so no warranty was involved. In the nuclear plant case, the court reviewed earlier New York cases under the verbal formula that courts, in determining the classification, "look to the main objective sought to be accomplished by the contracting parties." The court rejected the approach of applying sales law to the sales aspect of a transaction which combines both sales and service. The court ruled that whether the effect of disclaimers and limitations of liability should be considered under the U.C.C. or under the common law of service contracts should be deferred pending a development of the full record. Thus the burden of discovery will be necessary, and a trial if, after discovery, the court refuses to be satisfied with summary judgment affidavits to decide the factual issue of "the main objective of the parties."

Two contracts for the installation of glass panels both concluded that the contracts were for the sale of goods. One was for "curtain wall glass and glazing," which defendant had refused to replace.<sup>15</sup> The four-year statute was applied to bar the action. In the second glass case,<sup>16</sup> the contract was "to furnish and install aluminum and glass curtain wall and store front work." The installation contractor had purchased the glass from defendant, Shatterproof Glass Co. After the first installation, the glass became discolored and the defendant replaced the defective glass and paid for the cost of installation. Nine months thereafter the glass was again discolored, but the defendant declined to replace it a second time. Suit was brought more than four years after the first installation but less than four years after the second. On a federal rule 12(b)(6)

12. *Plouf Truck Lines, Inc.* might have argued that its claim against the manufacturer was essentially one for indemnity for amounts paid to customers and hence arose in Florida, where it paid damages. Here, too, it probably would be held to its averment, which was quickly admitted in the fabric maker's answer.

13. *Consolidated Edison Co. v. Westinghouse Elec. Corp.*, 567 F. Supp. 358, 36 U.C.C. Rep. Serv. (Callaghan) 1496 (S.D.N.Y. 1983).

14. *Perfetti v. McGhan Medical*, 662 P.2d 646, 35 U.C.C. Rep. Serv. (Callaghan) 1472 (N.M. Ct. App. 1983).

15. *R.W. Murray Co. v. Shatterproof Glass Corp.*, 697 F.2d 818, 35 U.C.C. Rep. Serv. (Callaghan) 477 (8th Cir. 1983).

16. *Coakley & Williams, Inc. v. Shatterproof Glass Corp.*, 706 F.2d 456, 36 U.C.C. Rep. Serv. (Callaghan) 87 (4th Cir. 1983).

motion to dismiss the complaint for failure to state a cause of action, the court ruled that enough was stated in the complaint so that, in view of the favorable position of plaintiffs in such motions, it could not be ruled that the contract with the installer was not a contract for the sale of goods. The court then assumed that the second installation had the same warranties as the first. The result was that the action brought almost seven years after the sales contract was made was, nevertheless, timely because it was within four years of the second installation. The court mentioned that in a long-term contract with installment deliveries a new period of limitations began with each delivery.

The court stated that the issue for trial was whether, if the contract with the installer, as distinguished from the installer's contract with the defendant, was for services and so free of warranties, the plaintiff could directly sue the defendant. The issue arose because Maryland, where all this occurred, had adopted a nonuniform amendment to its Uniform Commercial Code section 2-314(1)(b), providing that the term "seller" in sections 2-314 through 2-318 of its U.C.C. included "the manufacturer, distributor, dealer, wholesaler, or other middleman or the retailer," and also providing that "any previous requirement of privity is abolished as between the buyer and the seller in any action brought by the buyer."<sup>17</sup> But no change was made in the definition of "buyer" in U.C.C. section 2-102(1)(a) as "a person who buys goods." Hence, an issue would exist, if properly raised, that since plaintiff's only contract was with the installer, that contract would also have to be a contract for the sale of goods so that plaintiff would be a buyer within Maryland's statutory abolition of the doctrine of privity.<sup>18</sup>

One other case involved a patient who died during open-heart surgery due to an alleged defective heart-lung-oxygenator which, the complaint alleged, pumped air into the patient's aorta instead of blood.<sup>19</sup> The case adopted the service contract analogy with respect to the patient-hospital and patient-doctor contracts.

In *Semler v. Knowling*,<sup>20</sup> the Iowa Supreme Court, while classifying a contract by a landlord with defendant contractor to install a sewer line as a service contract, did provide a common law warranty recovery for the landlord for damages suffered due to repeated back-ups in the sewer line, dumping raw sewage in the basement of the apartment. The court found no reason to exclude this landlord from the warranty protection given a lessee of a dwelling or a buyer of goods.

The so-called "predominant purpose test" does not seem to have either reduced litigation or made advising clients any easier. Neither has the continu-

17. Hence it may not be true, as the editor's note states, that the court could have reached the same result by applying Maryland's nonuniform amendment. At least the court did not seem to think so.

18. See *supra* note 17.

19. *Redwine v. Baptist Gen. Convention*, 34 U.C.C. Rep. Serv. (Callaghan) 883 (Okla. Ct. App. 1982).

20. 325 N.W.2d 395, 34 U.C.C. Rep. Serv. (Callaghan) 1542 (Iowa 1982).

ous flow of cases involving the application of some or all of the sections of article 2 of the U.C.C. to equipment leasing transactions.<sup>21</sup>

## **ARTICLE 2—SALES**

An overview of the cases decided under article 2 does not indicate any startling new departures, but rather continued uneasiness in working out an eventual rule leading to identical results in products liability cases whether the action is in contract or tort. The cases also show that courts too often treat the interpretations of particular sections of the U.C.C. after the manner of a single ad hoc statute rather than an integrated Code.

## **FORM, FORMATION, AND READJUSTMENT OF CONTRACT**

### **STATUTE OF FRAUDS**

One of the more misapplied sections of U.C.C. section 2-201 is its "between merchants" provision. Under subsection (2), the statute of frauds was satisfied when a merchant failed to object to a timely "confirmation" of an oral contract within ten days after receipt with reason to know the contents. In *Thompson Printing Machinery Co. v. B. F. Goodrich Co.*,<sup>22</sup> the United States Court of Appeals for the Seventh Circuit considered when, in a large organization, a mailing addressed just to the corporation was to be considered "received" with "reason to know its contents."

In the case, Thompson Printing Machinery Co. claimed an oral contract for the purchase from B. F. Goodrich Co. of three items of printing machinery showing that a memorandum to which no objection had been made, had been sent four days after the telephone conversation. Goodrich defended on the ground of no oral contract and no receipt of the memorandum by anyone whose reason to know the contents was effective against Goodrich. Its defense was that Thompson had not sufficiently addressed the envelope for the contents to comply with the statutory requirements, as it was just addressed to the corporation in Akron, Ohio.

After a jury verdict for Thompson on both the existence of the oral contract and the receipt of the written confirmation, the district judge ruled, as a matter of law, that Goodrich had a statute of frauds defense. On August 18, 1983, the court of appeals reversed and remanded on the ground that the terms of the statute were satisfied on either of two grounds. The first ground was that receipt by the mail room was receipt by Goodrich as there was no specific requirement in the Code that the memorandum be received by any Goodrich agent in particular. The reason to know the contents was said to be satisfied because the purchase order was not a "spurious document." The second ground was that

21. See Mooney, *Recent Cases Relating to Equipment Leasing*, Equipment Leasing (P.L.I. 1983).

22. 714 F.2d 744, 36 U.C.C. Rep. Serv. (Callaghan) 737 (7th Cir. 1983).

“[e]ven if we go beyond the literal requirements of § 2-201(2) and read into the ‘receipt’ requirement the ‘receipt of notice’ rule of section 1-201(27), we still think Thompson” satisfied the requirements of U.C.C. section 2-201(2).<sup>23</sup> The reasoning given was that the procedures followed by the mail room could not be said to have constituted due diligence as a matter of law. The court said, “First the purchase order on its face should have alerted the mail room that the documents referred to a purchase of used printing equipment.”<sup>24</sup> Hence, since Goodrich had only one surplus equipment department, the document and the check should have been sent there,<sup>25</sup> or the mail room should have telephoned Thompson to ask who should receive the memorandum and the enclosed check.

Corporate counsel may find their client’s mail room procedures worth examining in the light of the case. The court did not have to decide whether, in view of U.C.C. section 1-207(27), the ten days of U.C.C. section 2-201(2) should run from the time of receipt by the mail room or from, perhaps, the one-week-later-plus telephone call when there should have been receipt by the relevant department. The latter date seems preferable in view of the reason-to-know-its-contents language in the statute. The defense of the statute of frauds should not be lost until the memorandum reaches an individual having the authority and the duty to send objections, namely, the “individual conducting the transaction” under U.C.C. section 1-207(27).

The Sixth Circuit in *Roth Steel Products v. Sharon Steel Corp.*<sup>26</sup> had to deal with a conflict in the terms required to be in the memorandum under U.C.C. section 2-201(1) and Ohio’s “not to be performed within one year” general statute of frauds provision. Under the latter statute, Ohio case law required that the writing include all the terms of the agreement.<sup>27</sup> While admitting in a footnote that the Eighth Circuit had reached an opposite conclusion<sup>28</sup> on the similar statutes of another state, the Sixth Circuit found an irreconcilable conflict between the two Ohio provisions, both as to what should be in the memorandum and in the “admission in court” exceptions of U.C.C. section 2-201(3)(b). The court flatly stated that the statutory section in which the one-year provision is found was a general provision applicable to all contracts and the U.C.C. statute of frauds section was a special provision, being a “special legislative attempt to tailor the statute of frauds to the unique characteristics of a

23. 714 F.2d at 748, 36 U.C.C. Rep. Serv. at 742.

24. 714 F.2d at 748, 36 U.C.C. Rep. Serv. at 742-43.

25. Unless one takes the position that “everyone” knows that Goodrich makes no printing equipment and hence any “Purchase Order” for printing equipment must be for surplus equipment even though not described as used.

26. 705 F.2d 134, 35 U.C.C. Rep. Serv. (Callaghan) 1435 (6th Cir. 1983).

27. *Id.* at 141 n.12, 35 U.C.C. Rep. Serv. at 1144-45 n.12. The court cited *Quarto Mining Co. v. Litman*, 326 N.E. 2d 676 (1975) and *O’Leary v. Burnett*, 92 N.E.2d 407, 408 (Ohio Ct. App. 1949).

28. 705 F.2d at 141 n.11, 35 U.C.C. Rep. Serv. at 1444 n. 11 (citing *Oskey Gasoline & Oil Co. v. Continental Oil*, 534 F.2d 1281, 19 U.C.C. Rep. Serv. (Callaghan) 61 (8th Cir. 1976)).



commercial sales transaction."<sup>29</sup> Once having made the general-special classification without any great discussion or reasoning, it followed that the special, the U.C.C., must be construed as an exception to the general, and so would prevail.

It would seem that one could argue that contracts for the sale of goods, where performance of a contract could not occur within a year, were exceptions to the general run of contracts for the sale of goods and could require greater formality. The Code drafters were not unaware of the very prevalent one-year provisions. Had it been intended to supplant the one-year rule, provision could easily have been made to have the memorandum under U.C.C. section 2-201(1) made sufficient for both statutes. The result might well have been that the "between merchants" "admission in court" exceptions in U.C.C. sections 2-201(2) and (3) would also have been made applicable to the performance-within-one-year statute. Whether they should apply to long-term contracts is an issue the resolution of which may well depend upon the resolver's general feeling about the efficacy of statutes of frauds today.

A clear misreading of the provisions and intent of U.C.C. sections 2-201 and 2-202 occurred, but not for the first time,<sup>30</sup> in *David J. Joseph Co. v. S & M Scrap Metal Co.*<sup>31</sup> After prior oral discussions, S & M sent a purchase confirmation form to Joseph Co. covering "'60 carloads (estimated 2700 gross tons)' of '#2 bundles of scrap iron for remelting and recycling.'" After shipping about 1305 tons in "33 or 34 carloads," Joseph ceased shipping and sued for payment contending that the quantity term in the confirmation incorrectly stated the quantity term orally discussed. The jury agreed, and the trial court rendered judgment for Joseph and also against S & M on its counterclaim for damages for failure to ship the balance of the 2700 gross tons.

The purchase confirmation also contained price and delivery terms and a reference to terms on the reverse, one of which was quoted by the court as providing:

This confirmation constitutes the entire contract between the parties. Receipt of this confirmation by seller shall be deemed to be an acceptance by seller of the terms and conditions of this contract regardless of whether

29. 705 F.2d at 141, 35 U.C.C. Rep. Serv. at 1445. For an approach requiring compliance with both goods and the "one year," see Restatement (Second) of Contracts § 110 comment b and § 130, comment f (1981).

30. Cf., e.g., *Shpilberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 535 S.W.2d 227, 18 U.C.C. Rep. Serv. (Callaghan) 579 (Ky. 1976); *Trafalgar Square, Ltd. v. Reeves Bros., Inc.*, 35 A.D.2d 194, 315 N.Y.S.2d 239 (1970), for some roots of this bad law. See *Duesenberg, Annual Survey: General Provisions, Sales, Bulk Transfers and Documents of Title*, 30 Bus. Law 847, 853 (1975), where the Survey discusses the interplay of U.C.C. § 2-207 and § 2-201 is used to make a confirmation binding. See also *Southern Concrete Servs., Inc. v. Mableton Contractors, Inc.* 407 F. Supp 581, 19 U.C.C. Rep. Serv. (Callaghan) 79 (N.D. Ga. 1975), *aff'd*, 569 F.2d 1154 (5th Cir. 1978); *Matthew Bender & Co. v. Jaiswal*, 463 N.Y.S.2d 78, 35 U.C.C. Rep. Serv. (Callaghan) 1414 (N.Y. App. Div. 1983).

31. 163 Ga. App. 685, 35 U.C.C. Rep. Serv. (Callaghan) 44 (1982).

or not the seller has acknowledged this confirmation. Any additional or inconsistent terms or conditions are not binding on [appellant] . . .<sup>32</sup>

Joseph Co. admitted receipt and that no objection was made.

Combining U.C.C. sections 2-201(2) and 2-202, the court ruled that the purchase confirmation became, through the failure to object, a final integrated agreement. Joseph Co.'s contention that the purchase confirmation was not intended to be the final expression of the parties (that is, both) was denied because it "directly contradicts the document's express terms which were not objected to within ten days of receipt."<sup>33</sup>

Ignored totally was the second sentence of comment 3 to U.C.C. section 2-201, which states of subsection (2) "[t]he only effect, however, is to take away from the party who fails to answer the defense of the Statute of Frauds; the burden of persuading the trier of fact that a contract was in fact made orally prior to the written confirmation is unaffected." This is not legislation by comment; it is a statement of the underlying purpose of any statute of frauds. Compliance with the statute merely opens the mouths of the parties. Courts following the *Joseph Co.* approach give the last-shot confirmer tremendous leverage contrary to the purpose of the statute, which was merely to allow oral testimony from both.

## CONTRACT INFORMATION

### *Offer and Acceptance*

One of the basic questions in any contract dispute is whether there have been an offer and an acceptance. The U.C.C. addresses these issues in U.C.C. sections 2-204 through 2-207. Courts look at the context in which an offer and acceptance allegedly took place. If there is a strong course of dealing, as exemplified by exchanges of letters on prior occasions, the court will be likely to sustain the trial court's finding as to whether there was an "agreement".<sup>34</sup>

Under U.C.C. section 2-205, a party may make an irrevocable offer without requiring additional consideration if certain factual conditions are present. In *City University of New York v. Finalco, Inc.*,<sup>35</sup> a New York court doubted whether the offeror, who apparently continued negotiations after the "offer," had really made an offer, and whether the parties intended to be bound by the agreement. Therefore it denied a motion for summary judgment. In *Day v.*

32. *Id.* at 685, 35 U.C.C. Rep. Serv. at 45.

33. *Id.* at 687, 35 U.C.C. Rep. Serv. at 47.

34. See *Bethlehem Steel Corp. v. Litton Indus., Inc.*, 468 A.2d 748, 37 U.C.C. Rep. Serv. (Callaghan) 1059 (Pa. Sup. Ct. 1983) where a panel of seven superior court judges reversed on rehearing the previous holding of a three-judge panel (*Id.* at 35 U.C.C. Rep. Serv. 1091 (Pa. Sup. Ct. 1982)) which held there was no contract despite the holding of the trial judge to the contrary. Of the seven-judge panel, three judges dissented, substantially following the previous panel's opinion.

35. 461 N.Y.S.2d 830, 36 U.C.C. Rep. Serv. (Callaghan) 35 (N.Y. App. Div. 1983) (all conc., except Sandler, J.P. and Alexander, J., diss. w/op.).

*Amax, Inc.*,<sup>36</sup> the only semblance of an offer was an escrow agreement signed by the offeree and containing some of the terms for a possible sale. The court held that this did not constitute an offer either.

If an offer does not generate an acceptance, it is basic that there can be no contract. Under U.C.C. section 2-206, a seller may accept an offer embodied in a purchase order simply by shipping the goods. The Code does not specify other actions that might constitute acceptance. In *Foremost Pro Color, Inc. v. Eastman Kodak Co.*,<sup>37</sup> the seller's registry of the buyer's purchase orders as "received" did not manifest either an acceptance or a promise to ship that could constitute an acceptance. Therefore, there was no contract. But would a registry that read "received—need to ship by next Monday" or "received—ship by next Monday" have qualified as sufficient action to constitute acceptance?

Another issue of acceptance arose in *D. R. Curtis Co. v. Mason*,<sup>38</sup> in which the seller said he "might be interested in contracting to sell his spring wheat crop" to the buyer. The court held that this was not an acceptance, just an "exploration of the possibilities of a sale."

### ***Indefiniteness and Open Terms***

Under U.C.C. section 2-204, the parties need not meticulously fill in every single term of an agreement in order to form a valid contract. How many terms, however, may the parties leave open before the court will decide that they did not intend to make a contract?

Several recent cases attempted to answer that question. In *Roy Buckner Chevrolet, Inc. v. Cagle*,<sup>39</sup> the buyer's order form was only partially complete, was not signed in the right place by the seller's agent, and the price was given only as "list price." Nonetheless, the court deemed this order form sufficiently filled-in to constitute both a valid contract under U.C.C. section 2-204(3) and an enforceable contract under U.C.C. section 2-201, the statute of frauds, which requires a writing "sufficient to indicate that a contract for sale has been made."

The price term was an issue in two other cases. In *Vermont Morgan Corp. v. Ringer Enterprises, Inc.*,<sup>40</sup> the parties wrote that the price term was to "be determined by reference to prevailing prices in the state." This raised so many questions of fact that the court denied summary judgment and ordered the trial court to consider both the parties' course of dealings and reasonableness of the price charged in establishing the price term. In *D. R. Curtis Co. v. Mathews*,<sup>41</sup> the parties, following their course of dealing, left a significant component of the price term open, hoping that they could agree on it later. When they failed to agree, the court filled in the term with the solution of U.C.C. section 2-305, a "reasonable price at the time for delivery."

36. 701 F.2d 1258, 35 U.C.C. Rep. Serv. (Callaghan) 1416 (8th Cir. 1983).

37. 703 F.2d 534, 35 U.C.C. Rep. Serv. (Callaghan) 1087 (9th Cir. 1983).

38. 649 P.2d 1232, 34 U.C.C. Rep. Serv. (Callaghan) 1109 (Idaho Ct. App. 1982).

39. 418 So. 2d 878, 34 U.C.C. Rep. Serv. (Callaghan) 413 (Ala. 1982).

40. 461 N.Y.S.2d 446, 35 U.C.C. Rep. Serv. (Callaghan) 756 (N.Y. App. Div. 1983).

41. 653 P.2d 1188, 35 U.C.C. Rep. Serv. (Callaghan) 1425 (Idaho Ct. App. 1982).

There were only two cases concerning requirements contracts. In *Cavalier Mobile Homes, Inc. v. Liberty Homes, Inc.*,<sup>42</sup> the court held that, since there was no indication that the quantity to be delivered was to be measured by requirements, there was no true requirements contract. There was a true requirements contract, however, in *Stacks v. F. & S. Petroleum Co.*<sup>43</sup> There was also no duration term. The court held that the sentence, "We agree to furnish you fuel in an amount up to 50,000 gallons per month" indicated that the "requirements would approximate a reasonably foreseeable figure, in this instance, 50,000 gallons per month," although the buyer presumably could require fewer gallons if he did not need that many. The duration of the contract was "a reasonable time," as U.C.C. section 2-309 indicates.

### ***Waivers and Modifications***

U.C.C. section 2-209 is the basic provision dealing with modifications and waivers. U.C.C. section 2-209(1) makes good faith the touchstone for modification. Because good faith and commercial reasonableness are obligations that pervade article 2 as to merchants, a modification must meet both standards.<sup>44</sup>

If the parties agree in writing that they will modify their agreement only by a written modification, they ought not be able to modify orally. However, the waiver provision in U.C.C. section 2-209(4) is so broad that it virtually nullifies such a clause in the written contract. Moreover, the parties' post-contracting conduct can indicate their mutual intent to modify, as was held in *Linear Corp. v. Standard Hardware Co.*<sup>45</sup>

Perhaps the most common waiver is a seller's waiver of the right to receive timely payments. In *Westmont Tractor Co. v. Viking Exploration, Inc.*,<sup>46</sup> a lessor waived the requirement that he receive an advance payment from the lessee before he delivered the goods to the lessee. A seller is, however, sometimes justified in retracting a waiver. For example, in *Hart v. Sims*,<sup>47</sup> the seller waived her right to receive payments on time by accepting the buyer's untimely personal check. She was justified in retracting that waiver when she learned the check was drawn against insufficient funds.

While there is perhaps no duty to agree to or negotiate in good faith for a modification, a court could avoid a modification extracted in bad faith and by an overuse of bargaining power in a time of product shortage by allowing a buyer to recover the extra price paid as a cost of "cover," using the amended contract as cover for the original contract. This could be a neat way of avoiding the area of economic duress, and this may well be what was back of the 1979 decision in

42. 454 A.2d 367, 35 U.C.C. Rep. Serv. (Callaghan) 1081 (Md. Ct. Spec. App. 1983).

43. 641 S.W.2d 726, 35 U.C.C. Rep. Serv. (Callaghan) 376 (Ark. Ct. App. 1982).

44. *Roth Steel Products v. Sharon Steel Corp.*, (Callaghan) 705 F.2d 134, 35 U.C.C. Rep. Serv. (Callaghan) 1435 (6th Cir. 1983).

45. 423 So. 2d 966, 35 U.C.C. Rep. Serv. (Callaghan) 1141 (Fla. Dist. Ct. App. 1983).

46. 543 F. Supp. 1314, 34 U.C.C. Rep. Serv. (Callaghan) 423 (D. Mont. 1982).

47. 702 F.2d 574, 35 U.C.C. Rep. Serv. (Callaghan) 1517 (5th Cir. 1983).

*B. B. Walker Co. v. Ashland Chemical Co.*<sup>48</sup> on obtaining cover from the original seller.

## THE BATTLE OF THE FORMS

While there were no startlingly new developments in the area of the "battle of the forms," the current cases do show that current high interest rates, a problem also discussed hereinafter under "Remedies,"<sup>49</sup> have also surfaced where different provisions about delayed payments are used. How should a term for interest on delayed payments be treated? In *Eskay Plastics Ltd. v. Chappell*,<sup>50</sup> the Washington Court of Appeals ruled that a term for interest on delayed payments became a part of the contract between merchants absent a showing by the buyer contesting the term that its offer expressly limited the acceptance to the terms of the offer, or that the term factually amounted to a material alteration. Incidentally, the buyer lost on claims that the term was "inconspicuous" (no objection to it having been sent) and that failure to make the interest charge on previous invoices amounted to a waiver of the term.

On the other hand, a majority of the Idaho Supreme Court in *Rangen, Inc. v. Valley Trout Farms, Inc.*<sup>51</sup> seemed to prefer the illustrative statement in the comment<sup>52</sup> that "a clause providing for interest on overdue invoices" was a clause "offering no element of surprise" and was therefore "to be incorporated into the contract unless notice of objection is seasonably given" to the trial judge's laconic statement that a clause which raised the amount of interest payable from the \$1,400 recoverable by law to \$27,000 was "'a substantial alteration in anyone's view.'" <sup>53</sup> Judge Brestline dissented on the ground that the trial judge's ruling on material alteration should have been upheld, noting that certain cases cited by the majority<sup>54</sup> upheld trial court findings instead of reversing them. He also protested the majority's analogy of the interest provision to a provision for liquidated damages based on a reference at the end of the above quoted comment to U.C.C. section 2-718. The reference was at the end of

48. 474 F. Supp. 651, 34 U.C.C. Rep. Serv. (Callaghan) 561 (M.D. N.C. 1979).

49. See *infra*, text accompanying notes 176-83.

50. 660 P.2d 764, 36 U.C.C. Rep. Serv. (Callaghan) 38 (Wash. Ct. App. 1983).

51. As revised on rehearing, 658 P.2d 955, 35 U.C.C. Rep. Serv. (Callaghan) 1129, and 35 U.C.C. Rep. Serv. (Callaghan) 52 (Idaho 1982).

52. U.C.C. § 2-207, comment 5 (1978), gives illustrations of clauses said not to be material alterations. The text of the comment reads: a clause providing for interest on overdue invoices or fixing seller's standard credit terms where *they* are within the range of trade practice and do not limit any credit bargained for . . ." (emphasis added). Grammatically, the antecedent of "they" could be construed as referring only to "credit terms." But Brestline, Jr., in *Rangen Inc.*, indicated that in context it might refer to "interest" as well.

53. 658 P.2d at 960, 35 U.C.C. Rep. Serv. at 1137 (Brestline, J., dissenting).

54. *Tim Hennigan Co. v. Anthony A. Numes, Inc.*, 437 A.2d 1355, 32 U.C.C. Rep. Serv. (Callaghan) 730 (R.I. 1981); *F.D. McKendall Lumber Co. v. Kalian*, 425 A.2d 515, 30 U.C.C. Rep. Serv. (Callaghan) 1237 (R.I. 1981); *Interlake, Inc. v. Kansas Power & Light Co.*, 398 N.E.2d 945, 28 U.C.C. Rep. Serv. (Callaghan) 689 (Ill. Ct. App. 1979). The majority's list also included *Loizeaux Builders Supply Co. v. Donald B. Ludwig Co.*, 366 A.2d 721, 21 U.C.C. Rep. Serv. (Callaghan) 58 (N.J. Super. Ct. 1976), which was not referred to by J. Brestline.

a term in the comment relating to clauses limiting the right of rejection in accordance with trade practices or "otherwise limiting remedy in a reasonable manner."

On rehearing, the court added material to the effect that the buyer had waived its objection to the interest term by continuing to order fish food after seller had insisted the interest term was a part of the contract. As to this, Judge Brestline also dissented.

The real problem may well be the way statutory fixed rates for prejudgment interest get out of line with a rapidly fluctuating market rate of interest. The resulting dollar difference in Idaho was startling. The statute provided for a prejudgment interest of eight percent a year on open account terms after the ninetieth day of nonpayment. It is also worthy of note that the quoted comment 5 appeared in the May 1949 draft.<sup>55</sup> In the interest rate market of that day,<sup>56</sup> and in the drafting period thereafter, the market rates were low<sup>57</sup> and it made sense to refer to provisions for interest as nonmaterial changes.

In addition, while the 1956 recommendations made no changes, they did change the comment 6 to U.C.C. section 2-207 by adding

Where clauses on confirming forms sent by both parties conflict each party must be assumed to object to a clause of the other conflicting with one on the confirmation sent by himself. As a result the requirement that there be notice of objection which is found in subsection (2) is satisfied and the conflicting terms do not become part of the contract. The contract then consists of the terms originally expressly agreed to, terms on which the confirmation agree, and terms supplied by this Act including subsection (2).

This last comment overlooks the effect of "silent terms," that is, statutory provisions that, by operation of law, become part of a contract unless otherwise agreed. Are they not part of an offer which does not spell them out? And does the comment intend to limit "silent terms" to those found in the Code to the exclusion of other statutes such as prejudgment interest statutes? It would seem that the Code, under U.C.C. section 1-103,<sup>58</sup> should not do this. The result, however, would be that all attempts in the second salvo of the battle of the forms to modify silent contract terms are doomed to be relegated to mere "proposals for addition to the contract." Presumably, then, the modifying terms would require an express consent for inclusion in the contract, or the terms expressed in the opening salvo will govern.

A problem is also found in cases where a seller accepts by shipping and sending an invoice with additional terms. In *Surplus Electronics Corp. v.*

55. Uniform Commercial Code § 2-207, comment 5 (May 1949 Draft).

56. See Fed. Res. Bull. Statistics for 1949-1952—interest rates.

57. Many municipal bonds were sold at rates of 1.5% and 1.75% on long-term bonds at that time.

58. U.C.C. § 1-103 (1978) (directing the application of the principles of law and equity "[u]nless displaced by a particular provision of this Act").

*Gallin*,<sup>59</sup> the Colorado Court of Appeals was faced with a seller's term, in the second salvo, for interest on past-due accounts and obliging buyer to pay seller's attorney's fees. Seller testified the term was not discussed. The buyer testified that there was a conversation with the seller in which it was agreed that neither was a part of the contract. The term was in small print. The court concluded that on either version of the discussions there was not sufficient evidence to establish an agreement "or that the small print on the invoice . . . was a part of the contract."<sup>60</sup>

Sometimes the discrepancies in the wording of the forms may not affect the dispute before the court. Then, in the interest of preserving the transaction between the parties, the Missouri Court of Appeals in *Central Bag Co. v. W. Scott & Co.*<sup>61</sup> ruled that the terms in seller's invoice confirmation differing from those in buyer's order confirmation form did not permit buyer to refuse to perform on the ground that there was no contract. The case seems correct in that the policy of article 2 as a whole is to prevent discrepancies in the paper work from spoiling a contract where the discrepancies are relied on in an effort to get out of a transaction. In this sense, the "materially alter" clause of U.C.C. section 2-207(2)(b) could be read as meaning "change the outcome of the suit before the court."

The usual case, however, involves clauses that do materially alter the outcome or the locus of litigation. This year two cases illustrate the struggle over conflicting warranty terms that had a substantial effect on liability. One was *Wheaton Glass Co. v. Pharmex, Inc.*<sup>62</sup> Here the buyer's purchase order was silent on the matter of consequential damages. Shortly after its receipt, seller, apparently on the same day, shipped the goods. At common law this would have been an acceptance on the buyer's terms, but the seller also on the same day sent a document captioned "Order Billing" containing a clause, all in capital letters, stating in some detail that the seller should not be liable "for special or consequential damages." Admitting that such a clause could be regarded as a material alteration, the court said that the issue, assuming the Order Billing form constituted the acceptance, could not be decided on a motion for summary judgment as the issue was one of fact. An apparently opposing position was taken in *Mead Corp. v. McNally-Pittsburgh Manufacturing Corp.*,<sup>63</sup> before the Sixth Circuit Court of Appeals, which stated that issues raised by an exchange of business forms were issues of law and should not be submitted to a jury. There was, however, no reversal of the judgment below as the court felt that the jury's interpretation of the disclaimer of warranties should stand.

59. 653 P.2d 752, 35 U.C.C. Rep. Serv. (Callaghan) 425 (Colo. Ct. App. 1982).

60. *Id.* at 754, 35 U.C.C. Rep. Serv. at 428.

61. 647 S.W.2d 828, 35 U.C.C. Rep. Serv. (Callaghan) 71 (Mo. Ct. App. 1983).

62. 548 F. Supp. 1242, 35 U.C.C. Rep. Serv. (Callaghan) 65 (D.N.J. 1982).

63. 654 F.2d 1197, 35 U.C.C. Rep. Serv. (Callaghan) 368 (6th Cir. 1981).

On the other hand, in one case<sup>64</sup> there was language in a purchase order limiting the contract to its terms. The language specifically prohibited changes unless made in writing by the purchaser and stated that “[b]uyer’s inspectors and expeditors are not authorized to order changes affecting the . . . purchase order. . . .” District Judge Hannum faced what was in essence a claim for modification. The seller’s acknowledgement forms limited its liability to replacing defective goods or allowing credit for them, and specifically stated that “ ‘no claims for labor or consequential damages [would] be allowed’ .”<sup>65</sup> The seller’s form stated that its terms became a part of the contract when signed by buyer. Employees of buyer had signed the acknowledgement form to acknowledge receipt of the goods.

Noting that similar clauses had been held materially to alter the contract, Judge Hannum also interpreted the buyer’s clause as limiting acceptance to its terms unless altered by an agreement enforceable by justifiable reliance by the seller. He concluded that an issue of fact was raised concerning the authority of the signing employees to bind the buyer. Therefore he felt summary judgment was precluded.

*Northern States Power Co. v. International Telephone & Telegraph Corp.*<sup>66</sup> illustrates how problems can be created in form contracting. Northern States Power sent out a “Request for Quotation.” Defendant Meyer, a division of ITT, responded with a proposal which read, “Delete your paragraph 6 and replace with our paragraph 16 ‘Warranty and Limitation of Liability Clause’.” During the following negotiations nothing was said about the limitation of liability clause. Meyer was given an oral order to proceed. Then Northern States issued its purchase order “Confirming verbal order of 8-11-78 Per Your Proposal #780049 of 7-16-78,” but stating nothing about a limitation of liability clause. In response, Meyer issued its “Sales Acknowledgement Form” with a statement of its “Basis of Acceptance” incorporating “Meyer Terms and Conditions of Sale as stated in Proposal 780049 dated July 16, 1978.” Also on the back of the form were “Terms and Conditions of Sale” containing the identical paragraph 16 as in the proposal.

Since the purchase order offer referred to the proposal and did not change it, the court felt that both offer and acceptance contained the same terms limiting Meyer’s liability “solely to job site replacement or repair, at the sole option of Meyer, of any defective part or parts during a period of one (1) year from date of shipment, providing the product is properly installed and is being used as originally intended.” This was followed by a paragraph, all in capital letters, making the clause the buyer’s exclusive remedy and providing that “under no circumstances shall Meyer be liable for any costs loss, expense, damages, special damages, incidental damages, or consequential damages arising directly or

64. *Reliance Steel Prod. Co. v. Kentucky Elec. Steel Co.*, \_\_\_\_ F. Supp. \_\_\_\_, 35 U.C.C. Rep. Serv. (Callaghan) 1430 (E.D. Pa. 1983).

65. *Id.* at 1432 nn. 3 & 4.

66. 550 F. Supp. 108, 35 U.C.C. Rep. Serv. (Callaghan) 1124 (D. Minn. 1982).



indirectly from the use of the products, whether based upon warranty, contract negligence or strict liability." Not much left to sue about!

Clearly this was a "parts only" warranty. The products were screw anchors designed to hold guy wires supporting towers holding high-tension transmission wires. One thousand of these were installed in the ground during February and March 1979. About five months later aluminum towers were flown into place and the guy wires were tightened. A month or so thereafter four towers fell to the ground because the screw anchors came apart at a welded joint. The Northern States determined that all should be replaced. The total cost was \$2,404,016.

Since the court ruled that both parties' forms contained that clause due to the "per your proposal" reference in the Northern States purchase order, plaintiff argued unconscionability and that the limited remedy had failed in its essential purpose. Unconscionability received short shrift, the court stating there was no basis for it as no personal injury was involved and there was no inequality of bargaining power. But under applicable Minnesota law,<sup>67</sup> where the clause failed in its essential purpose, plaintiff would be entitled to recover consequential and other damages. This raised issues of fact about whether there had been such a failure, so summary judgment was denied.

A case where overdrafting backfired is *Salt River Project Agricultural Improvement & Power District v. Westinghouse Electric Corp.*<sup>68</sup> Buyer's form contained a provision for full warranties and also contained the following:

Acceptance of this Purchase Order must be made on its exact terms and if additional or different terms are proposed by Seller such response will constitute a counter-offer, and no contract shall come into existence without Buyer's written assent to the counter-offer. Buyer's acceptance of or payment for material shipped shall constitute acceptance of such material subject to the provisions herein, only, and shall not constitute acceptance of any counter-offer by Seller not assented to in writing.

The "acknowledgement" by Westinghouse stated "YOUR ORDER HAS BEEN ENTERED AS OUR GENERAL ORDER (GO) NUMBER AS SHOWN ABOVE. Our Regional Order Correspondent will be better able to serve you if our GO number is referred to in all communications. . . . SEE REVERSE SIDE FOR TERMS AND CONDITIONS.'" On the reverse the opening paragraph read "The conditions stated below shall take precedence over any conditions which may appear on your standard form, and no provisions or condition of such form except as expressly stated herein, shall be binding on Westinghouse.'" <sup>69</sup>

Plaintiff purchased a gas turbine unit and a control device which malfunctioned, allegedly causing an explosion and \$1,900,000 in damage. The Westing-

67. Considerations making the Minnesota law applicable are discussed, *supra*, in the text following note 2.

68. \_\_\_\_ P.2d \_\_\_\_, 37 U.C.C. Rep. Serv. (Callaghan) 75 (Ariz. Ct. App. 1983).

69. *Id.* at 77-78.

house form limited recovery on express warranties to claims made within one year of the sale, with the same limitation on claims for breach of implied warranties, and a limitation of tort liability to the \$15,000 cost of the product.

Plaintiff argued that under U.C.C. section 2-207(3), since the writings disagreed, the contract consisted of the terms on which the writings agreed and the warranties of the Code filled the warranty gap.

The court used the common law approach. Plaintiff had characterized any response with different terms as a counteroffer. Further, the Westinghouse form had no explicit "definite and seasonable expression of acceptance" because, said the court, the "Purchase Order would not permit it to be one." Since a counteroffer revokes the offer, the issue was whether plaintiff had accepted the Westinghouse offer. Acceptance was found through plaintiff's receipt, payment for, and use of the product. One can wonder what rules the court would have applied had the plaintiff's form not referred to a form with additional or different terms as a counteroffer? Would it have found another way to continue to apply common law rules despite the Code?

In other rulings the court held that strict liability in tort did not apply to two large commercial enterprises which were dealing from positions of relatively equal bargaining strength, and that there was no unconscionability about the terms specified. It affirmed summary judgment for Westinghouse on the strict liability and warranty claims, as well as partial summary judgment in tort, limiting the Westinghouse liability to the cost of the defective product.

Finally, in *Slocomb Industries, Inc. v. Chelsea Industries*,<sup>70</sup> District Judge Newcomer was faced with a claim that U.C.C. section 2-207(3) should be applied when, after a contract had expired by its terms, the parties continued to deal. Defendant seller had prepared and sent to buyer a form of contract. Buyer never signed it. The suit was for breach of warranty and for refusal to continue to supply. Buyer attempted to make a case under U.C.C. section 2-207(3), claiming that the conduct of the parties made a contract on the terms of the writing sent by defendant.

Judge Newcomer ruled that U.C.C. section 2-207(3) was not the appropriate section unless there were conflicting writings. Rather, the Code required resort to U.C.C. section 2-204, and this precluded summary judgment as the factual issue was whether there was mutual assent and the facts in the affidavits before the court on summary judgment were in conflict as to mutual assent. However, the learned judge ruled that the facts did show a sufficient basis for believing that a contract existed to dismiss the defense of the statute of frauds under U.C.C. section 2-201. He correctly pointed out that such a ruling did not preclude either a later finding that no contract had been formed or a finding as to the terms on which one had been formed, that is, whether there was any obligation to continue to supply.<sup>71</sup>

70. \_\_\_\_ F. Supp. \_\_\_\_, 36 U.C.C. Rep. Serv. (Callaghan) 1543 (E.D. Pa. 1983).

71. Also asserted was a Clayton Act violation on which the judge did grant defendant's motion for summary judgment.

From the foregoing and from the cases discussed in previous annual surveys,<sup>72</sup> it can be seen that U.C.C. section 2-207 does not settle problems arising in the battle of the forms too aptly, and above all, the denials of summary judgment show that, in cases of dispute over what terms are in the contract, there is no method of avoiding the cost, expense, and time involved in preparing for and conducting a jury trial.

In today's world of mass marketing, perhaps there is a need to re-examine the problem. Perhaps sellers should be allowed to specify the terms on which sales of products will be made without regard to which party sends off the first form,<sup>73</sup> subject to (and here there will be disagreement even among the members of this subcommittee) some carefully worked out limitations on disclaimers and limitations of liability to restrain the protective drafting enthusiasm of those representing sellers. Standardized forms bargained between representatives of sellers and representatives of buyers, such as now exist in some trades, may be one answer.<sup>74</sup> Perhaps some burden of justification should be placed on sellers departing from such norms. Perhaps, too, consumers and others buying in small quantities should have more protection than other buyers. Equally, buying behemoths should be subject to some limitations on overreaching. The unconscionability rules of U.C.C. section 2-302 have not proved to be the desired escape valve. Perhaps some less pejorative verbal formula can be found. The incurable optimism of the average entrepreneur leads to a disregard of what might go wrong in many cases, so that perhaps leaving the matter to market forces may not be the answer. Some sort of antidiscrimination approach might be desirable. In *Rangen, Inc. v. Valley Trout Farms, Inc.*,<sup>75</sup> the Supreme Court of Idaho rejected evidence that plaintiff had not made similar interest charges to other purchasers as irrelevant. Yet even Professor Llewellyn's comments, adopted in the Code comments to U.C.C. section 2-207, seem to refer to a limitation upon such clauses to be found in variations from "the range of trade practice." The suggestion made above should not be taken as indicating any thought that negotiated terms, whether in a form negotiated by industry representatives for both buyer and seller or in a jointly signed agreement of the

72. See, e.g., Duesenberg, *U.C.C. Survey: General Provisions, Sales, Bulk Transfers and Documents of Title*, 38 Bus. Law 1109, 1115-27 (1983); *Id.* 37 Bus. Law 949, 955-72 (1982).

73. See, on the subject of general conditions of the contract, O. Lando, *General Conditions of Contracts*, Studies in Scandinavian Law 129 (1966); S. Jorgensen, *Contract as Form*, Studies in Scandinavian Law 120 (1966).

74. Cf. The Worth Street Rules of the textile trade. Professor Leary has participated in three such exercises, one on behalf of consumers for the standard mortgage forms of the Home Loan Mortgage Corp., and two on behalf of Pennsylvania's General State Authority for contracts with architects and with design engineers. Cf. also form contract of the Millers' National Federation and the American Bankers Assoc. at issue in *Int'l Milling Co. v. Hachmeister, Inc.*, 380 Pa. 407, 110 A.2d 186 (1955), and the standard contract form known as UNIFIN 1959 adopted by the Timber Trade Federation of the United Kingdom and the Finnish Sawmill Owner's Assoc., and other such forms of agreement. See also Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 Harv. L. Rev. 529 (1971).

75. 658 P.2d 955, 35 U.C.C. Rep. Serv. (Callaghan) 1129, and 35 U.C.C. Rep. Serv. (Callaghan) 52 (Idaho 1982).

parties, should not stand. It is directed solely to the issue of whether there should not be some limitation on a seller's general conditions of sale if they are to be given preference.

## WARRANTIES

In addition to the various statute of limitations problems discussed hereinafter,<sup>76</sup> the intermesh of the Code warranties sections and section 402A of the Restatement of Torts now must interface with the various products liability statutes presently in force in at least sixteen states.<sup>77</sup> The problem reached the Federal Court of Appeals for the Sixth Circuit in *Karl v. Bryant Air Conditioning Co.*,<sup>78</sup> a case arising under Michigan law. As the issues involving the Michigan Products Liability Act<sup>79</sup> were matters of first impression, the federal court certified three questions to the Michigan Supreme Court.<sup>80</sup> The issues were: Did the statute apply to actions based on warranty or strict liability? Did the statute apply to causes of action arising before the statute was enacted? And did the statute violate the due process clause of the Michigan constitution?

The Michigan Supreme Court answered the first question, ruling that the statute applied to all actions whether in warranty, strict liability, or negligence, due to its definition of "products liability action" as "an action based on any legal or equitable theory of liability brought for or on account of death or injury to person or property. . . ."<sup>81</sup> As to the second question, there was no impermissible retroactivity under Michigan rules governing retroactive applications as the statute, in its substantive provisions, related only to the conduct of the trial and the application of a rule analogous to comparative negligence.<sup>82</sup> The statutory provision provided that plaintiff's or decedent's contributory negligence shall not bar recovery, "but the damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff."<sup>83</sup> Finally, the last question was answered in the negative. There was no violation of the Michigan due process clause.<sup>84</sup>

76. See *infra* text accompanying notes 194-202.

77. In *Williams v. West Penn Power Co.*, 467 A.2d, 811 (Pa. 1983), the opinion lists the following states as "[a]t least sixteen states have adopted products liability statutes of limitation: Alabama, Arizona, Arkansas, Colorado, Connecticut, Florida, Idaho, Illinois, Indiana, Iowa, Michigan, Minnesota, Nebraska, New Hampshire, Oregon and Tennessee." *Id.* at 817 n.18.

78. 705 F.2d 164, 35 U.C.C. Rep. Serv. (Callaghan) 1494 (6th Cir. 1983).

79. §§ 600.2945-.2949 Mich. Comp. Laws Ann. (West 1983 Supp.).

80. 35 U.C.C. Rep. Serv. (Callaghan) 382 (Mich. 1982).

81. § 600.2945 Mich. Comp. Laws Ann. (West 1983 Supp.). The definition continues "caused by or resulting from the manufacture, construction, design, formula, development of standards, preparation, processing, assembling, inspection, testing, listing, certifying, warning, instructing, marketing, advertising, packaging or labeling of a product or component of a product."

82. Section 600.2949(2) Mich. Comp. Laws Ann. (West 1983 Supp.) provides for an award of costs and reasonable attorneys' fees to the prevailing party "if the court determines a claim or defense is frivolous." Shouldn't this be the rule in all cases?

83. The Michigan due process clause is expressed in the passive tense: "No person shall be deprived . . ." hence no "state action" is necessarily involved.

84. 35 U.C.C. Rep. Serv. at 390-91.

Armed with these answers, the Sixth Circuit disposed of the case on the merits and reduced plaintiff's recovery. The federal court also found no violation of the federal prohibition against state laws impairing the obligation of contracts.

Other warranty cases in considerable number involved mostly factual issues, except for a case on notice to remote manufacturers<sup>85</sup> and cases on the application of an appropriate statute of limitations,<sup>86</sup> discussed under those topics.

## **TITLE, CREDITORS, AND GOOD-FAITH PURCHASERS**

The more interesting cases under this topic involve the possible scenarios under U.C.C. section 2-403. First is the "no-title" case, the sale in the absence of any title. For example, in a sale by one receiving goods from a thief, or one taking from a thief, the buyer or donee transfers no title. In no-title cases the true owner recovers. The second is the "voidable-title" sale where there is a consensual transfer of title but in circumstances giving the transferor grounds to rescind and revest the title in itself. Where a legal title is thereafter passed by the transferee to a bona fide purchaser, the purchaser prevails over the equity of rescission. In the third case, a true owner has parted with less than full title. This is the "entrusting" situation.<sup>87</sup> The recipients of the transfer, who have the power but not the right to divest true owner's title, are a more limited class as they must be "dealers in goods of that kind." Equally, the purchasers are a more limited kind, namely buyers in the ordinary course of business.<sup>88</sup>

The entrusting section gives the power to transfer only the titles of two persons, that of the entruster and that of the person entrusted with the goods. In this sense, U.C.C. sections 2-403(2) and (3) are parallel to U.C.C. section 9-307(1) which also divests only two titles, that of the seller and that of the holder of a security interest created by the seller.

Just as there can be two security interests created by a dealer in the same goods, one a first and one a second lien, so there can be two entrusters. At least this is the teaching of *In re Woods* (*Locke v. Woods*).<sup>89</sup> The case involved a car that was subject to a security interest in a bank. The car was returned by the debtor to the dealer from whom it had been purchased, to be sold. On disputed evidence, the court held that the first secured party was aware of the return at some relevant point in time. The dealer sold the car to a buyer in ordinary

85. See *infra* text accompanying notes 146-48.

86. See *infra* text accompanying notes 194-202.

87. U.C.C. § 2-403(2) (1978) provides: "Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business."

Subsection (3) states: "'Entrusting' includes any delivery and any acquiescence in retention of possession regardless . . ."

88. U.C.C. § 1-201(9) (1978) defining "Buyer in ordinary course of business," requires that the buyer buy "in ordinary course from a person in the business of selling goods of that kind . . ." Buying "does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt."

89. 35 U.C.C. Rep. Serv. (Callaghan) 256 Bankr. E.D. Tenn. (1982).

course, who financed with a credit union. The dealer became bankrupt before remitting the proceeds. The bank refused to surrender the title papers. The ultimate purchasers sued for a declaratory judgment.

The bankruptcy judge stated that the ultimate buyers could not prevail under U.C.C. section 9-307(1) as the bank's security interest was created by the first buyer, not the dealer selling to the ultimate buyer. The judge was also aware of cases to the effect that a buyer who cannot prevail under U.C.C. section 9-307(1) cannot prevail under U.C.C. section 2-403(2).<sup>90</sup> But this is not the entire story. A buyer who might not prevail under U.C.C. section 9-307(1) can prevail under U.C.C. section 9-306(2) if the secured party has "otherwise" authorized the sale.<sup>91</sup>

Also, under U.C.C. section 2-403(3), entrusting is committed not only by anyone who delivers possession, but also by anyone who "acquiesces" in retention of possession. Hence, a secured party who acquiesces in the retention of possession by a dealer in goods of that kind has entrusted his interest in the goods to the dealer, even though the security interest was created by another who had also entrusted his equity.

This was the conclusion of the bankruptcy judge in *In re Woods*.<sup>92</sup> He felt that there could be difficulties in finding an "authorization" for the sale under U.C.C. section 9-306(2) from mere acquiescence in the dealer's retention of possession, stating: "The secured party who knows of the debtor's delivery of the collateral to a merchant for sale cannot lie in wait until the merchant has misled some innocent buyer and then recover the collateral on the ground that it did not authorize the sale in writing."<sup>93</sup>

Whether the bank's knowledge of the return of the car to the dealer constitutes "acquiescence" in the dealer's retention of possession is another question. In view of the decisions under U.C.C. section 9-306(2) on what constitutes an authorization "otherwise,"<sup>94</sup> there may be recoveries under U.C.C. sections 2-

90. *E.g.*, *National Shawmut Bank v. Jones*, 236 A.2d 484, 4 U.C.C. Rep. Serv. (Callaghan) 1021 (N.H. Sup. Ct. 1967) and progeny.

91. U.C.C. § 9-306(2) (1978) provides that a disposition by the debtor does not divest a perfected security interest "unless the disposition was authorized . . . in the security agreement or otherwise . . ."

92. 35 U.C.C. Rep. Serv. (Callaghan) 256 (Bankr. E.D. Tenn. 1982).

93. *Id.* at 265.

94. *See, e.g.*, *Vermilion County Prod. Credit Ass'n v. Izzard*, 111 Ill. App.2d 190, 249 N.E. 2d 352, 6 U.C.C. Rep. Serv. (Callaghan) 940 (1969); *Southwest Washington Prod. Credit Ass'n v. Seattle-First Nat'l Bank*, 593 P.2d 167, 26 U.C.C. Rep. Serv. (Callaghan) 1346 (Wash. Sup. Ct. 1979); *North Cent. Kan. Prod. Credit Ass'n v. Washington Sales Co.* 223 Kan. 689, 577 P.2d 35, 23 U.C.C. Rep. Serv. (Callaghan) 1343 (1978); *Wabasso State Bank v. Caldwell Packing Co.*, 251 N.W.2d 321, 19 U.C.C. Rep. Serv. (Callaghan) 315 (1976); *Vermilion County Prod. Credit Ass'n v. Izzard*, 111 Ill. App. 2d 190, 249 N.E. 2d 352, 6 U.C.C. Rep. Serv. (Callaghan) 940 (1969); *Overland Nat'l Bank of Grand Island v. Aurora Coop. Elevator Co.*, 184 Neb. 843, 172 N.W.2d 786, 7 U.C.C. Rep. Serv. (Callaghan) 11 (1969) (all refusing to find that the prohibition in the security agreement against selling without secured party's consent was waived by a course of dealing where secured party routinely accepted proceeds of unauthorized sales). Note that immediately after the contrary decision in *Clovis Nat'l Bank v. Thomas*, 425 P.2d, 4 U.C.C. Rep. Serv. (Callaghan)

403(2) and (3) when there would not be under U.C.C. section 9-306(2). Or should the two rules be made identical?

A similar but different fact pattern was before the court in *Ocean City National Bank v. Palmer*,<sup>95</sup> involving a twenty-two-foot pleasure craft. The dealer sold the boat to Palmer, retaining a security interest which the dealer assigned to Ocean County Bank. The interest was perfected by the filing of a financing statement. Palmer returned the boat to the dealer to sell and pay off the bank. The dealer sold, retained a security interest which it discounted with another bank, and failed to remit the proceeds to the first bank. Then the dealer filed for bankruptcy.

As Ocean City National Bank apparently had no knowledge of the return to the dealer, acquiescence was not argued. U.C.C. section 2-403(2) was used in a closing statement in the opinion to the effect that if Palmer had any equity in the boat it belonged to the buyers. But they had created a security interest in that equity. Short shrift was given an argument that since Palmer's security interest was from Palmer to the dealer, the interest in the dealer's assignee was a security interest created by the dealer by assignment. "Not so," said the court; it was created by Palmer, and the Ocean City Bank prevailed as first claimant to the sale proceeds.

*In re Seiler*,<sup>96</sup> decided by the Bankruptcy Court for the Northern District of Indiana, held that a buyer was a buyer in ordinary course despite the fact that the selling dealer had not received the certificate of title from his seller. Hence, the buyer had priority over a state tax lien asserted against the dealer when it received the title certificate endorsed to it. The court protected the buyer by virtue of the policy of U.C.C. sections 2-403 and 9-307(1), although it is difficult to visualize a state tax lien as a security interest created by the dealer. In fact, it was created by the revenue department against the dealer. A holding that, since the sale by the dealership had occurred before the attachment date of the tax lien, the car was not the dealer's property on that date would have provided a better analysis.

A most interesting entrusting case is *Exxon Company v. TLW Computer Industries, Inc.*<sup>97</sup> Two of the defendants, both Boston Stock Exchange corporations (Stock Exchanges),<sup>98</sup> desired to replace some of their computers with newer but still used equipment. They asked TLW to obtain for them an IBM 370/155, which it did not then own. In July 1977, an agreement for sale at a price of \$310,000 was made with TLW, although Stock Exchanges knew that TLW did not then own one. Later in July, TLW learned that Exxon wanted to

137 (N. Mex. Sup. Ct. 1967), the New Mexico legislature, by nonuniform amendment to its UCC, made provision to prevent the decision from being followed, by adding to § 9-306(2) the sentence: "A security interest in farm products and the proceeds thereof shall not be considered waived by any party by any course of dealing between the parties or by any trade usage."

95. 457 A.2d 1225, 36 U.C.C. Rep. Serv. (Callaghan) 310 (N.J. Super. Ct. 1983).

96. 29 Bankr. 33, 36 U.C.C. Rep. Serv. (Callaghan) 316 (Bankr. N.D. Ind. 1983).

97. CA 79-211OT (D. Mass. Nov. 16, 1983). Appeal pending.

98. These two defendants appear to have acted as one in the transaction and will be referred to together hereafter.

dispose of an IBM 370/155. Exxon entered into an agreement with TLW, entitled "Equipment Lease Agreement," with payments of \$11,000 a month and an option price at the end of the term of \$167,000.

On August 12, 1977, on Exxon's premises, IBM employees packed the equipment for shipment, arranged by TLW, to Stock Exchanges in Baytown, Massachusetts. This was a violation of the lease agreement with Exxon, and apparently Exxon did not know where the computer was located until February of 1978. TLW was in financial difficulties and was not able to work out any purchase arrangement with Exxon. A conversion action was then instituted by Exxon, after demand and refusal to surrender, against Stock Exchanges and others.

Stock Exchanges defended on two grounds. The first, with which we are not concerned, was that the Exxon-TLW contract was not a lease but a conditional sale. On this ground they were not successful. The second defense was that TLW was a dealer in previously owned computers, and that Exxon had entrusted the computer to TLW. Stock Exchanges asserted that they were buyers in ordinary course and hence had acquired not only TLW's title but also Exxon's title under U.C.C. sections 2-403(2) and (3). Exxon's response was that Stock Exchanges were not buyers in ordinary course because they did not purchase the goods out of inventory.<sup>99</sup> This suggestion the court refused to adopt, citing as support for its refusal *In re Morristown Lincoln-Mercury, Inc.*,<sup>100</sup> where the sale was by the dealership, but off premises, and the item sold had not been seen in the dealership's inventory by the buyer.

The district judge nevertheless ruled that Stock Exchanges were not buyers in ordinary course, apparently on the ground that the provision was intended to protect "innocent" purchasers. It then followed that whether Stock Exchanges were innocent was a factual determination.<sup>101</sup> The judge then cited three reasons to support his "factual" determination. They were: first, that TLW did not have an IBM 370/155 in inventory at the time of the sale; second, the transaction involved a significant amount of money; and third, Stock Exchanges were "sophisticated business" entities. He concluded: "To permit Clearing and Service [Stock Exchanges] to rely with impunity on TLW's undocumented warranty of title of a used computer, not in inventory, and never seen or inspected prior to delivery, would allow them to benefit from their own imprudence."<sup>102</sup> Strangely, the judge did not discuss, nor did he refer to the definition of "buyer in ordinary course of business" in U.C.C. section 1-201(9).

99. Exxon relied on the "out of inventory" language in comment 2 to U.C.C. § 2-403 (1978), stating that the policy of the sections is to gather various pre-Code protections "into a single principle protecting persons who buy in ordinary course out of inventory."

100. 25 Bankr. 377, 35 U.C.C. Rep. Serv. (Callaghan) 268 (Bankr. E.D. Tenn. 1982), discussed hereinafter on other points.

101. The District Judge cited U.C.C. § 2-403, comment 2 for this statement, but the word "innocent" nowhere appears in the comment.

102. *Exxon Co. v. TLW Computer Indus., Inc.*, CA 79-211OT (D. Mass. Nov. 16, 1983).



Yet his conclusions could fit the definition, perhaps, under either of two elements of that definition.

The first is "good faith." U.C.C. section 2-103(1)(b) defines "good faith" in the case of a merchant as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." Conceivably a court could be comfortable with applying only a subjective standard where a merchant buys under U.C.C. section 9-307(1), thereby divesting a security interest, and an objective standard under U.C.C. sections 2-403(2) and (3) when the purchase divests the interest of a true owner. Or should the standard be the same?

The second, and perhaps sounder, approach would be to concentrate on the words "buys in ordinary course." The words are in addition to the requirement of "good faith" and must mean something in addition. This, however, would be a factual issue and would require evidence as to what constitutes "the ordinary course of business" in the particular trade.<sup>103</sup>

A limitation to "out of inventory" at the time of negotiation of the deal would unduly limit the scope of protection of all "special order" buyers and would unduly limit the phrase in the definition that "Buying . . . includes receiving goods . . . under a pre-existing contract for sale."<sup>104</sup>

In addition to the problem of the off-premises sale, *In re Morristown Lincoln-Mercury, Inc.*<sup>105</sup> stated, in a U.C.C. section 9-307 context, that a sale by a lessee-dealer should divest the lessor's interest as well as a secured party's interest, despite the issuance of a certificate of title.<sup>106</sup>

One no-title case involved a purchase of a truck from a police department by a dealer who then sold the truck to an individual in May 1976.<sup>107</sup> Five years later an officer of the police department seized the truck to return it to the true owner from whom it had been stolen before the police department first seized and sold it. Plaintiff buyer from the dealer filed a creative suit against the seizing officer for violation of plaintiff's civil rights. A motion to dismiss for failure to state a cause of action failed, the court ruling that in Pennsylvania possession is *prima facie* evidence of ownership so plaintiff was, at the least, entitled to a hearing before being deprived of possession of the truck. One

103. *Rhode Island Hosp. Trust Co. v. Leo's Used Car Exch., Inc.*, 314 F. Supp. 254, 8 U.C.C. Rep. Serv. (Callaghan) 93 (D. Mass. 1970), also can be justified as giving meaning to "in ordinary course." The sale was made before a used car auction, outside the auction premises, in a state where neither buyer nor seller did business.

104. Note that U.C.C. § 2-106 (1978) includes in the definition of "Contract for sale" both a present sale and a contract to sell at a future time, the usual circumstance in a special order purchase as well as other types.

105. *Bankr. E.D. Tenn.*, 25 BR 391 (1982).

106. The bankruptcy judge distinguished *Manufacturer's Acceptance Corp. v. Bank of Knoxville*, 324 S.W.2d 417 (Tenn. 1959), which upheld the claim of a prior interest noted on a certificate of title because in that case all parties knew they were dealing with a second-hand car. Here the buyer did not know that it had previously been sold by the dealer to its vice-president or that a certificate of title was outstanding.

107. *Justice v. Fabey*, 34 U.C.C. Rep. Serv. (Callaghan) 515 (E.D. Pa. 1982).

wonders what success a suit against the police for breach of warranty of title would have had if brought by the dealer from whom the truck was purchased.

There are gambits, sometimes successful, that may be used under the entrusting section of the U.C.C. A buyer in ordinary course of business must buy in good faith. The U.C.C. definition is "honesty in fact."<sup>108</sup> But this has not prevented a gloss from developing where certain actions or situations show that further factual investigations may not have been made for fear of what would be uncovered. In *R.H. Macy's N.Y., Inc. v. Equitable Diamond Corp.*,<sup>109</sup> Macy's sold a ring to Ms. Marie Draper for \$9,742.50. Ms. Draper's check was later dishonored for insufficient funds, giving Macy's a right of reclamation under the cash sale rule and Ms. Draper a voidable title. She sold the ring to Equitable Diamond Co. for \$2,500. The court ruled that a triable issue existed on these facts as to Equitable's good faith. The "extremely low price" may not have been as low as the court indicated. Equitable sold for \$4,000 to another dealer, who then sold to a third dealer for \$4,900. The price among dealers would be a wholesale buying rate. The \$4,000 and \$4,900 were in the neighborhood of fifty percent of Macy's retail price. Hence, Equitable had purchased at between fifty-one percent and sixty-two percent of wholesale selling price, assuming that the sale between the second and third dealers was at the wholesale market price. But if facts about the proper markups were not before the court, then denial of the motion to dismiss for failure to state a claim was proper.

Another successful attack on good faith was mounted in *Liles Bros. & Sons v. Wright*.<sup>110</sup> Representing himself to be a farmer, Mangum bought a backhoe from Liles Bros. for \$20,561. Mangum then switched roles and, representing himself as a dealer, sold the backhoe to Wright, who operated a septic tank service, for \$11,000.<sup>111</sup> When Mangum's check to Liles for \$17,561 bounced, Liles Bros. traced the backhoe to Wright, who refused to give it up. In the ensuing litigation, the issue turned on Wright's good-faith-purchaser status as against Liles Bros.' claim to rescind and repossess the backhoe. Wright won in the trial court, as farmers usually do. Both the intermediate appellate court and the Tennessee Supreme Court ruled there was no evidence to support the finding that Wright was a bona fide purchaser and the trial court was reversed. Several factors swayed the appellate courts. The first was the low price to a purchaser who had been shopping for just such a backhoe and was familiar with values. He owned two other backhoes and was familiar with their values as well. Second, there was no printed letterhead on the bill of sale given by Mangum. Finally, Wright made no inquiries as to Mangum's business location or how to reach him after the sale. Wright was aware of a rash of heavy equipment scams in the Tennessee-Kentucky area, but only remarked that he hoped the backhoe wasn't stolen. The courts might have observed that while the

108. U.C.C. § 1-201(19) (1978).

109. 34 U.C.C. Rep. Serv. (Callaghan) 896 (N.Y. Civ. Ct. 1982).

110. 638 S.W.2d 383, 34 U.C.C. Rep. Serv. (Callaghan) 1174 (Tenn. 1982).

111. It is startling that complicated scams will be committed for so little profit. Here the crook paid out \$3,000 and recovered \$11,000, or a net of \$8,000, less expenses.

definition of good faith as "honesty in fact" may have adopted "the law of the white heart and the fat head," it was never intended that the head could be that fat.<sup>112</sup>

Where there is a delivery in satisfaction of a pre-existing debt, the purchaser cannot be a buyer in ordinary course of business, but he can be a bona fide purchaser. Where the entrusting also involved a transfer of title, even though the transaction of resale supported a criminal conviction, the teaching of *Davis v. C.B. Livestock Co.*<sup>113</sup> is that a bona fide purchaser from one with a voidable title will still prevail. Yet, when a crook delivered goods obtained wrongfully from his employer by diverting a shipment through altering shipping instructions, the crook, even though a salesman in the employ of the true owner, obtained no title. Thus, in *Textile Supplies, Inc. v. Garrett*,<sup>114</sup> the Fifth Circuit panel permitted the true owner to recover the price of the goods which the innocent purchaser of "no title" had resold.

### **TENDER, CURE AND NOTICE OF BREACH**

U.C.C. section 2-601 embodies the pre-Code rule of "perfect tender," while U.C.C. section 2-612 espouses a rule of substantial performance. As Professor Llewellyn pointed out, Mr. Hiram Thomas knew why the "perfect tender rule was right for 'one delivery' contracts and the substantial performance rule was right for installment contracts," but Professor Llewellyn had forgotten just why, and Thomas' unfortunate death prevented him from refreshing Professor Llewellyn's memory.<sup>115</sup> Professor Llewellyn also died still unable to recall just why, but adamant in his conviction that the distinction was right and that Mr. Thomas had once convinced all listeners thereof.

Courts faced with a literal reading of U.C.C. section 2-601's "if the goods or the tender of delivery fail in any respect to conform to the contract" continue to debate over the application of these words in particular cases. One concern is the belief that a devious buyer could always find some defect in the goods or their tender to avoid what has unexpectedly turned out to be a bad bargain, but not bad enough to excuse performance under U.C.C. section 2-615 or otherwise. This concern apparently influenced the Indiana Court of Appeals in *National Fleet Supply, Inc. v. Fairchild*.<sup>116</sup> The trial court found that Fairchild had ordered "a Cummins NT 270 long block diesel engine" which National had contracted to supply but had delivered a 250. In a footnote to its statement of the rule of U.C.C. section 2-601 the court remarked: "Despite the code's apparent insistence on perfect tender, it is generally understood that rejection is not

112. Indeed, the facts would permit the inference that farmer Wright deliberately failed to investigate for fear of what he might find out; this is a well-known formulation for lack of subjective good faith.

113. 41 Agric. Dec. 942, 34 U.C.C. Rep. Serv. (Callaghan) 906 (Bankr. E.D. Tenn. 1982).

114. 687 F.2d 123, 34 U.C.C. Rep. Serv. (Callaghan) 900 (5th Cir. 1982).

115. As reported by Professor Grant Gilmore, ALI-ABA Transcript of Advanced Course on Banking and Secured Transactions, New Orleans, Feb. 1-4, 1967 (1968), 145.

116. 450 N.E.2d 1015, 36 U.C.C. Rep. Serv. (Callaghan) 480 (Ind. Ct. App. 1983).

available in circumstances where the goods or delivery fail in some respect to conform to the terms of the sales contract."<sup>117</sup>

Notwithstanding the words of Professors White and Summers, the understanding is not so general. In *Texas Imports v. Allday*,<sup>118</sup> a sale-of-cattle case, a jury found that four out of forty-three heifers were not sound due to "double muscling." The condition would make calving difficult. The jury had also made a finding of substantial performance. The holding was that the submission of a special interrogatory on substantial performance was improper, the court saying

The finding made in Special Issue No. 1 is not an issue controlling an ultimate fact since the doctrine of substantial performance is not applicable under § 2.601 which controls this breach of contract dispute under the facts in the record. The so-called 'perfect tender rule' is expressed in the language of said section, and '[t]here is no room in commercial contracts for the doctrine of substantial performance.'<sup>119</sup>

It has always been understood that the Code has, by its concept of cure in U.C.C. section 2-508, created some undermining of the perfect tender rule. Less frequently discussed is the potential effect of U.C.C. section 2-504 on the tender-of-delivery aspect of U.C.C. section 2-601. In *Monte Carlo Shirt, Inc. v. Daewoo International (America) Corp.*,<sup>120</sup> a minor part of the case<sup>121</sup> involved Daewoo's claim that the following instruction to the jury was prejudicial, namely: "'A buyer has no duty to accept goods or pay for them unless there has been a proper tender of delivery. If the tender of delivery fails in any respect to conform to the contract, the buyer may reject the goods.'" <sup>122</sup> An instruction was also given that for Daewoo to recover, it must establish that it had been damaged by defendant's breach. This was followed by an instruction based on the postamble to U.C.C. section 2-504 which provides "Failure to . . . make a proper contract [for transportation] under paragraph (a) is a ground for rejection only if material delay or loss ensues." Daewoo claimed that there was a conflict between U.C.C. section 2-601 and U.C.C. section 2-504 and that the jury should have been told that U.C.C. section 2-504 controlled. There had been a rejection, Monte Carlo claiming the documents necessary to clear the shipment (through customs) arrived too late for the Christmas sales. There was admittedly a one-day delay in shipment by Daewoo. Monte Carlo sued for, and

117. *Id.* at 1017 n.4, 36 U.C.C. Rep. Serv. at 484 n.4 (citation omitted).

118. 649 S.W.2d 731, 36 U.C.C. Rep. Serv. (Callaghan) 491 (Tex. Ct. App. 1983); accord *Atlan Indus. v. O.E.M., Inc.*, 555 F. Supp. 184, 35 U.C.C. Rep. Serv. (Callaghan) 795 (W.D. Okla. 1983); *Deaton, Inc. v. Aeroglide Corp.*, 657 P.2d 109, 35 U.C.C. Rep. Serv. (Callaghan) 130 (N.M. 1982).

119. 649 S.W.2d at 737-38, 36 U.C.C. Rep. Serv. (Callaghan) at 498 (citations omitted).

120. 707 F.2d 1054, 36 U.C.C. Rep. Serv. (Callaghan) 487 (9th Cir. 1983).

121. The big money was involved in Monte Carlo's claim for trademark infringement when Daewoo's American affiliate resold the shirts to discount houses with Monte Carlo's labels and polybags intact. Monte Carlo lost on the claim.

122. 707 F.2d at 1059, 36 U.C.C. Rep. Serv. at 489.

the jury awarded, \$79,073 for lost profits. Daewoo appealed, having properly objected to the instructions.

The Ninth Circuit, at first blush, might seem to have confused the right to reject with the question of whether the breach caused damages. If Monte Carlo had a right to reject under U.C.C. section 2-601, could it do so whether the breach by Daewoo caused damages or not? The rejection would leave Daewoo with the goods and Monte Carlo with its money if it had not paid in advance. But if the one-day delay caused Monte Carlo to lose the Christmas sales on 2400 dozen men's shirts, it could be classed as a material loss. The court felt that the instruction to the effect that losses, to be recoverable, must be caused by the breach, bridged the gap, as the requirement of causality, it said, was as stringent as materiality. How else is the intermesh of U.C.C. section 2-504 and U.C.C. section 2-601 to be satisfied? Yet a problem results if buyer can reject for a late shipment only if, when suing as plaintiff, a material loss caused thereby can be proved, or if seller agrees that such a loss could be proved and accepts the rejection. Under this interpretation of U.C.C. section 2-504's post-ambles, for a seller to reject for a delayed delivery, a rather prompt estimate of damages to determine "materiality" is required. Otherwise buyer, after an acceptance of the goods would, under U.C.C. section 2-607(2), be limited to Code remedies other than rejection or revocation of acceptance. This seems to result in another undermining of the perfect tender rule.

The major undermining of the perfect tender rule was accomplished by the Code's right to cure under the two parts of U.C.C. section 2-508. The question of the timing of the offer to cure is of some importance as is the question of a seller's reasonable grounds to believe the tender would be acceptable. Subsection (1) requires that both the notification of intent to cure and the replacement delivery be made before the expiration of the time for a performance. Subsection (2), however, provides "Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may, if he seasonably notifies the buyer, have a further reasonable time to substitute a conforming tender."<sup>123</sup>

There are grammatical troubles with subsection (2) that were faced by the New York Court of Appeals in *T.W. Oil Inc. v. Consolidated Edison Co.*<sup>124</sup> The case involved a substantial delivery of fuel oil for electric generating plants. The contract called for oil with 0.5% or less sulphur content. Seller tendered oil after having received a refinery certificate that the sulphur content of the tendered oil was 0.52%. There was a trade custom to round off specifications of sulphur content at 1%, 0.5%, and 0.3%. When the oil arrived and was tested by independent testers, the sulphur content was found to be 0.92%. Negotiations on a price adjustment followed but broke down. A day after the negotiations broke down and about three weeks after the last day for delivery under purchase contract, seller offered to cure by a delivery of conforming oil to arrive

123. U.C.C. § 2-508(2) (1978).

124. 443 N.E.2d 932, 35 U.C.C. Rep. Serv. (Callaghan) 12 (N.Y. Ct. App. 1982).

one week later and thus about four weeks after the last date for delivery under the contract. This offer defendant rejected. The original contract price was \$3,360,667.14. T.W. Oil, Inc. sold the oil at \$1,385,512.83 below the contract price and sued for that amount. There had been an approximately twenty-five percent drop in the market price for "spot" oil between that prevailing when the contract was made and the date of the negotiations. Leave to appeal from a unanimous decision of the appellate division was granted. The judgments below sustaining the seller's right to cure were affirmed.

One of the grammatical problems with U.C.C. section 2-508(2) was not before the court. The last phrase, "further reasonable time," does not make clear from what point in time this further period is to run. The logical answer is from the notice which must be given within a reasonable time after the rejection or from the agreed time if one is in the contract.<sup>125</sup>

The second grammatical question is what is the full antecedent of the pronoun "which" introducing the clause requiring the seller to have reasonable grounds to believe in its acceptability? Or, as the issue was phrased by the court, may a post-performance-day cure be tendered by a seller "who acting in good faith and without knowledge of any defect"<sup>126</sup> made a tender that was in fact nonconforming and properly rejected? The court of appeals did not take "nonconforming tender" as the antecedent, only the word "tender." In its analysis of the facts, however, the court seemed to find that even if the seller knew the tender was nonconforming, it would have had reasonable grounds for believing that such a nonconforming tender would have been acceptable, pointing to seller's undisputed knowledge that defendant had previously used 0.92% oil and that defendant had been willing to accept the oil at a twenty-five-percent price reduction.

Defendant, however, relying on one textbook on the law of sales,<sup>127</sup> urged the court to rule that U.C.C. section 2-508(2) was limited to cure by seller's knowingly making an accommodation nonconforming tender. The court stated that the few decisions extant on the issue adopted a position opposed to that of the defendant, as did "the mainstream of scholarly comment on the subject."<sup>128</sup> The court stressed that U.C.C. section 2-508 was "intended to act as a meaningful limitation on the absolutism of the old perfect tender rule,"<sup>129</sup> and

125. See the definition of "seasonably." U.C.C. § 1-204(3) (1978).

126. 443 N.E.2d at 934, 35 U.C.C. Rep. Serv. at 14.

127. Nordstrom, *Law of Sales* § 105 (1970).

128. *Wilson v. Scampoli*, 228 A.2d 848, 4 U.C.C. Rep. Serv. (Callaghan) 178 (D.C. Ct. App. 1967); *Appleton v. Lee*, 148 N.W.2d (1967); cf. *Zabriskie Chevrolet, Inc. v. Smith*, 240 A.2d 195, 5 U.C.C. Rep. Serv. (Callaghan) 30 (N.J. Super. Ct. Law Div. 1968), see *infra*, articles cited at note 129.

129. 1955 Report of N.Y. Law Rev. Comm., at 484; J. White & R. Summers, *Handbook of the Law Under the Uniform Commercial Code* § 8-4, at 322 (2d ed. 1980); 3 Anderson, *Uniform Commercial Code* § 2-508:7 (2d ed.); Hogan, *The Highways and Some of the Byways in the Sales and Bulk Sales Articles of the Uniform Commercial Code*, 48 Cornell L. Rev. 1, 12-13 (1962); Note, *Commercial Law—The Effect of the Seller's Right to Cure on the Buyer's Remedy of Rescission*, 28

also stressed the Code's provisions for liberal construction of remedial provisions.

Also worthy of consideration is the fact that the cure rule (no matter which way it is interpreted) places a considerable restraint on the ability of a buyer receiving a nonconforming tender to move promptly to effect cover. This is especially true when lead times for delivery may be lengthening and supplies growing scarcer. Also, in a rising market, a wait to receive the seasonable notice and the further reasonable time for the substitute delivery can seriously affect the amount of money placed at risk of litigation, especially if the substitute delivery should also turn out to be defective. A buyer here has several decisions to make. The buyer must estimate the reasonable time for a notification of intent to cure, the seller's reasonable belief, and the like. Fortunately, the comment indicates that, if the bargaining position permits, a buyer can contract against there being any right to cure. Yet here, too, there is trouble, as the comment also indicates that such a clause may operate only as to the reasonableness of the seller's belief in acceptability.

Assuming a right to reject, it can be lost upon buyer's "acceptance" of the goods. Not surprisingly, therefore, there are numerous cases involving the question whether particular conduct on the part of the buyer constituted an acceptance of the goods. In *Columbia Can Co. of New Jersey v. Africa-Middle East Marketing, Inc.*,<sup>130</sup> the seller had shipped nonconforming goods to a location designated by the buyer. Subsequent to their arrival, the buyer requested transshipment by the seller to another location. When the transshipment occurred, the buyer had not yet inspected the goods which were moved with the original packaging unopened. In its suit for the purchase price, the seller persuaded the trial court that the transshipment constituted an act inconsistent with the seller's ownership under U.C.C. section 2-606(1)(c). The transshipment exposed the goods to outside storage for a period before they were again returned to the original location. The New Jersey Appellate Division reversed on three grounds. As to acceptance, the court adopted and quoted Professors White's and Summers' theory that, "Under no circumstances should an act of the buyer in ignorance of the defective nature of the goods be held 'inconsistent with the seller's ownership.'"<sup>131</sup> This, however, was at best one of three alternate holdings. The court felt that the trial court should have considered also whether there had been a valid revocation of any acceptance. In addition, the court said that acceptance did not deprive buyer of its rights to assert a claim for breach of warranty. As the defect, rust on the inside of containers, rendered the goods worthless, all avenues led to the same result: the buyer had no liability for the purchase price. The court further justified its reversal by saying:

Ark. L. Rev. 297 (1974); Note, *Seller's Right to Cure Non-Conforming Goods*, 6 Rut.-Cam. L. Rev. 387 (1974).

130. 455 A.2d 1143, 36 U.C.C. Rep. Serv. (Callaghan) 137 (N.J. Super. Ct. App. Div. 1983).

131. *Id.* at 1147, 36 U.C.C. Rep. Serv. at 143.

We note finally that the Commercial Code is not a recondite, obtuse or abstract document imposing irrational burdens upon commercial transactions. It is rather intended to conform to and codify the expectations, realities and common sense experience of the commercial community. It defies common sense for this buyer under the circumstances here to have to pay this seller for the defective goods. The Code does not require such a result and neither should the courts.<sup>132</sup>

In addition to a rejecting buyer, a buyer who revokes acceptance must also be concerned about a continued exercise of incidents of ownership as to the goods. If such actions are viewed as inconsistent with the seller's ownership of the goods, they would then vitiate the revocation of acceptance. Frequently, however, a buyer, especially a consumer buyer, after giving the notice of revocation, has no real choice but to continue using the goods until a replacement can be secured. *McCullough v. Bill Swad Chrysler-Plymouth, Inc.*<sup>133</sup> was such a case. Involved was the buyer's continuing need for transportation after giving a notice of revocation of acceptance that was not agreed to by the seller. The buyer continued to operate the automobile until the time of trial, adding 23,000 miles to the odometer. The seller claimed retraction of the revocation of acceptance, but the Ohio Supreme Court joined other state courts<sup>134</sup> and adopted a reasonable use test as an issue of fact for the trier of fact. In applying the test, the court said:

[T]he trier of fact should pose and divine answers to the following queries: (1) Upon being apprised of buyer's revocation of his acceptance, what instructions, if any, did the seller tender the buyer concerning return of the now rejected goods? (2) Did the buyer's business needs or personal circumstances compel the continued use? (3) During the period of such use, did the seller persist in assuring the buyer that all nonconformities would be cured or that provisions would otherwise be made to recompense the latter for the dissatisfaction and inconvenience which the defects caused him? (4) Did the seller act in good faith? (5) Was the seller unduly prejudiced by the buyer's continued use?<sup>135</sup>

With respect, the court's battery of questions is not very helpful in advising clients. The first question, giving instructions as to the return of the car, is not something a seller contesting the propriety of the attempted revocation of

132. *Id.* at 1148, 36 U.C.C. Rep. Serv. at 144.

133. 449 N.E.2d 1289, 36 U.C.C. Rep. Serv. (Callaghan) 513 (Ohio 1983).

134. *Uganski v. Little Giant Crane & Shovel, Inc.*, 192 N.W.2d 580, 10 U.C.C. Rep. Serv. (Callaghan) 57 (Mich. Ct. App. 1971); *Johannsen v. Minnesota Valley Ford Tractor Co.*, 304 N.W.2d 654, 31 U.C.C. Rep. Serv. (Callaghan) 558 (Minn. 1981); *Pavesi v. Ford Motor Co.*, 382 A.2d 954, 23 U.C.C. Rep. Serv. (Callaghan) 929 (N.J. Super. Ct. Ch. Div. 1978); *O'Shea v. Hatch*, 640 P.2d 515, 33 U.C.C. Rep. Serv. (Callaghan) 561 (N.M. Ct. App. 1982); *Mobile Homes Sales Management, Inc. v. Brown*, 562 P.2d 1378, 21 U.C.C. Rep. (Callaghan) 1040 (Ariz. Ct. App. 1977).

135. 449 N.E.2d at 1293, 36 U.C.C. Rep. Serv. at 518-19.



acceptance would do lest such action prejudice its position in any subsequent litigation. Also, if the seller said, "Park the car on my lot and give me the keys, and if your law suit is successful against me some three years from now, I'll pay whatever the court orders me to pay," the buyer needing transportation could not comply. The third question, if it occurs, could be either warranty performance, or work done for a fee which could occur regardless. The reference to good faith in the fourth question is, of course, to the article 2 definition of a merchant's good faith, which includes the observance of "reasonable commercial standards of fair dealing," a thing very hard to prove.

The real issues seem to lie with the answer to the second question, namely, the needs and financial condition of the buyer, and the fifth, prejudice to the seller. In the case of an automobile, in our present society, where in many areas there is no public transportation, the second item is crucial. Too few workers can continue paying on one car as to which acceptance has been revoked and return the car to the dealer pending suit, while simultaneously making a down payment and carrying installment payments on a second car. The fifth test can usually be satisfied by allowing a value-of-use offset to the seller. The majority of the Ohio Supreme Court ruled that the seller recover nothing for the 23,000 mile use, as it had introduced no evidence of the value of such use.<sup>136</sup>

The seller also made the interesting argument that the quantum of the buyer's use after giving notice of revocation of acceptance was a strong indication that the vehicle's nonconformities did not substantially impair its value to the buyer. Aside from the fact that the trier of fact had found against the seller, the court flatly stated that the inference contended for by the seller could not be drawn. Substantial impairment, said the court,

is a determination exclusively within the purview of the fact-finder and must be based on objective evidence of the buyer's idiosyncratic tastes and needs. . . . Any defect that shakes the buyer's faith or undermines his confidence in the reliability and integrity of the purchased item is deemed to work a substantial impairment of the item's value and to provide a basis for revocation of the underlying sales agreement.<sup>137</sup>

The seller's claim that the warranties and the vehicle service contract constituted the buyer's sole remedy was also unsuccessful. The court stated that the limited remedy had clearly failed of its essential purpose when attempts made over twelve months did not effect a cure.

136. One judge dissented, stating that the introduction of such evidence was not to be expected of one litigating on the basis of a waiver of the revocation of acceptance. *Id.* at 1295, 36 U.C.C. Rep. Serv. at 522 (Holmes, J., dissenting). But doesn't such a dilemma exist for every defendant asserting inconsistent defenses, where one cannot be true if the other is?

137. *Id.* at 1294, 36 U.C.C. Rep. Serv. at 520-21. The defects were recurrent brake failings, steering malfunctions, and other mechanical difficulties, and the fact that the fixing of one often appeared to be the cause of another defect "as well as the utter frustration caused by the seemingly endless array of cosmetic flaws, constituted non-conformities giving rise to the remedy of revocation." *Id.* at 1294, 36 U.C.C. Rep. Serv. at 520-21.

Each year issues as to notice of breach under U.C.C. section 2-607(3)(a) arise. The subsection, it is true, does have a lot of work to do as it covers any possible type of breach with the words "any breach." Yet the type of notice required varies with the nature of the breach. Also there is a repetition between the provisions in U.C.C. section 2-602 that a rejection "is ineffective" unless the buyer timely notifies the seller and in U.C.C. section 2-608(2) that a revocation of acceptance is "ineffective" until the buyer notifies the seller of it, and the blanket "any breach" rule of U.C.C. section 2-607(3)(a). The safe course to pursue is to interpret "notify the seller of breach," to require that some indication of the nature of the breach be given. The comment to U.C.C. section 2-607(3)(a) requires only a notice sufficient "to let the seller know that the transaction is still troublesome and must be watched." This is fine for breach of warranty, but will not do for other types of breach, delayed delivery, failure to allocate supplies properly under U.C.C. section 2-615(b), an "indication" under U.C.C. section 2-611(1) that a repudiation is considered final, and the like. *Roth Steel Products v. Sharon Steel Corp.*<sup>138</sup> makes the point that notice is required regardless of the nature of the breach. Relying on the language "any breach," in U.C.C. section 2-607(3)(a), the court rejected the buyer's contention that the subsection required notice only when the goods were defective. According to the court, "the same policies which support a rule requiring notice of breach when a latent defect is discovered also support a rule requiring notice of breach when performance does not conform to time or price terms of the contract."<sup>139</sup>

In *Taylor v. American Honda Motor Co.*<sup>140</sup> the District Court for the Middle District of Florida was faced with a notice question in a motion to dismiss an action for personal injuries based on a breach of warranty claim. There was no Florida decision to guide the court. The judge noted that the cases were divided, citing two rulings that notice is not a precondition,<sup>141</sup> and three for what was said to "appear" to be the majority view where the plaintiff, if a "buyer," must allege compliance with U.C.C. section 2-607(3)(a).<sup>142</sup> Here plaintiff had not alleged any contractual relationship with defendant on anybody's part. The court ruled that the complaint for breach of warranty was deficient in not alleging that plaintiff was either a buyer or a warranty beneficiary under Florida's adoption of alternative A of U.C.C. section 2-318. The judge then pointed out two exceptions to the rule of notice, referring to a line of Florida cases holding that a direct action against a manufacturer can be brought without

138. 705 F.2d 134, 35 U.C.C. Rep. Serv. (Callaghan) 1435 (6th Cir. 1983).

139. *Id.* at 152, 35 U.C.C. Rep. Serv. at 1462.

140. 555 F. Supp. 59, 35 U.C.C. Rep. (Callaghan) 391 (M.D. Fla. 1982).

141. *Hill v. Joseph T. Ryerson & Son, Inc.*, 268 S.E.2d 296, 29 U.C.C. Rep. Serv. (Callaghan) 1208 (W.Va. 1980); *Fischer v. Mead Johnson Laboratories*, 341 N.Y.S.2d 257, 12 U.C.C. Rep. 68 (N.Y. Sup. Ct. App. Div. 1973).

142. *Maybank v. S.S. Kresge Co.*, 273 S.E.2d 681, 30 U.C.C. Rep. Serv. (Callaghan) 985 (N.C. 1981); *Branden v. Gerbie*, 379 N.E.2d 7, 24 U.C.C. Rep. Serv. (Callaghan) 152 (Ill. App. Ct. 1978); *Redfield v. Mead, Johnson & Co.*, 512 P.2d 776, 13 U.C.C. Rep. Serv. (Callaghan) 10 (Or. 1973).

notice,<sup>143</sup> and to another group of cases holding that warranty beneficiaries need not give notice.<sup>144</sup> The latter cases were based upon a literal reading of U.C.C. section 2-607(3)(a)'s use of the word "buyer" only and disregarded, as unduly expanding the text of the statute, the comment's suggestion that "the reason of the section does extend to requiring the beneficiary to notify the seller that an injury has occurred."<sup>145</sup>

The notice exception as to suits against remote manufacturers came before the Maryland Court of Special Appeals in *Firestone Tire & Rubber Co. v. Cannon*.<sup>146</sup> The case involved only economic loss to trucker Cannon caused by a blow-out of the tire occurring just seven days after its installation by a "seller." A number of sellers were involved. The tire was purchased by Cannon from Elliott Equipment Company, which had acquired it from Swann Tire Center. Swann's personnel installed the tire at Elliott's facility. Swann had acquired the tire from Commercial Tire Co., which in turn had purchased from Seiberling Tire Co., a subsidiary of Firestone, the manufacturer. The name Seiberling was on the tire. The suit was for damages to the truck and \$8,000 loss of profits during the fourteen weeks the truck was undergoing repairs.

Within a few days after the accident, Cannon notified Elliott, but no notice was given to Swann, Commercial, Seiberling, or Firestone until the suit was filed two years later. At some time thereafter the action against the two local companies, Elliott and Swann, was dropped.

The verdict of the jury was on the plaintiff's breach of warranty theory. Firestone appealed on the ground of lack of notice. It claimed that direct notice to it was necessary, showing that it had been prejudiced by the lack of notice because evidence, including the rim of the wheel on which the defective tire was mounted, and debris from the tire, had been lost. The evidence was vital to Firestone's claim that there was no breach of warranty, only faulty installation. This defense, Firestone urged, created a conflict of interest between itself and the installer, making it in the installer's interest not to give early notice.

The court discussed the division of authority existing on the issue of notice to a remote seller. The majority sided with the cases dispensing with direct notice on the theory that notice to the immediate seller will be passed up the chain of distribution with claims for indemnity.

Judge Lowe, in a separate opinion, pointed out that [i]n a society surviving on mass production, the removal of the privity shield exposed the financial stability of manufacturers by creating an entire new vista of suits by plaintiffs

143. 555 F. Supp. at 63, 35 U.C.C. Rep. Serv. at 396.

144. *Simmons v. Clemco Indus.*, 368 So. 2d 509, 25 U.C.C. Rep. Serv. (Callaghan) 1088 (Ala. 1979); *Mattos v. Hash*, 368 A.2d 993, 21 U.C.C. Rep. Serv. (Callaghan) 473 (Md. Ct. App. 1977); *Frericks v. General Motors Corp.*, 363 A.2d 460, 20 U.C.C. Rep. Serv. (Callaghan) 371 (Md. Ct. App. 1976); *Chaffin v. Atlantic Coca-Cola Bottling Co.*, 194 S.E.2d 513, 11 U.C.C. Rep. Serv. (Callaghan) 737 (Ga. Ct. App. 1972).

145. U.C.C. § 2-607, comment 5 (1978). It seems that the American courts are not yet ready to interpret the Code as a code from which principles can be distilled and applied. Nor do the courts seem to be adopting the interpretive suggestions set forth in U.C.C. § 1-102 comment 1 (1978).

146. 452 A.2d 192, 34 U.C.C. Rep. Serv. (Callaghan) 1564 (Md. Ct. Spec. App. 1982).

and a fruitful field for specialization in the legal profession.”<sup>147</sup> Judge Lowe then pointed out that the present case showed the need for direct notice to the manufacturer since there was a clear conflict of interest between the installer and the manufacturer. He felt that procedural fairness, in view of the potential for conflict of interest between manufacturers and installers, required a rule of prompt notice to the manufacturer upon discovery of its name. As to this, he said, “Procedural fair play, like procedural due process must be equally provided not only to the poor or individual consumers but to the rich and corporate goliaths as well.”<sup>148</sup>

Strangely, in the cases on the issue of notice to remote sellers, no distinction has been made between products such as tires and many others which carry the name of the manufacturer and products or components which do not. Since we no longer insist (with some exceptions) upon a chain of privity for direct suit by reason of the use of the term “buyer” or “seller,” so we should no longer insist upon an up-the-chain system of notice where selfish interest can be served by an installer’s failure to give notice.<sup>149</sup> There is enough interpretative flexibility in the term “reasonable time” in U.C.C. section 2-607(3)(a) for a court to rule that the time runs from the discovery of the name, if the name of a remote seller or manufacturer is not on the product. But the potentiality for conflict of interest between manufacturer and immediate seller, especially when the latter can be dropped from the case, weighs heavily against the justice of a rule totally dispensing with notice.<sup>150</sup>

## **REPUDIATION AND EXCUSE**

The two topics, repudiation and excuse, have met a judicial reluctance to expand the rather restricted common law scope given to each.

At common law, courts appeared to have difficulty with the concept that there could be an exercise of remedies against a party before that party is supposed to start performing. Yet, if the essence of contract is the ability to rely for future planning on the expectation of the other party’s performance, then anything that destroys that expectation in a reasonable person should activate a right to take any action, including cover, deemed necessary or desirable to restore the expectation. Indeed, in view of the lead time needed to secure many goods, and in view of the difference often existing between spot prices and prices for future delivery, savings could be effected by early cover. Another point not enunciated by the courts is the natural desire of every businessman to keep the amount

147. *Id.* at 200, 34 U.C.C. Rep. Serv. at 1576 (Lowe, J., concurring).

148. *Id.* at 201, 34 U.C.C. Rep. Serv. at 1577.

149. The conflict exists in that the installer would not want the extensive expertise of the manufacturer concentrated on defective installation or modification by the intermediate seller, and so the notice might not be forwarded upstream.

150. Where the producer or manufacturer is named on the product, the rationale often stated for holding that no notice need be given, namely, that the producer or manufacturer is not known to the injured party, becomes inapplicable where the injured party is a remote buyer, but not inapplicable to an injured bystander beneficiary.

subject to the risks of litigation to the minimum. Hence, in many instances the selection of remedy and the timing of its exercise can be left to the discretion of the merchant. Similarly, some deference might be given to a merchant's decision that the expectation of future performance had been destroyed. Yet U.C.C. section 2-160 gives no indication of any change in what will trigger the right to exercise remedies. The word "repudiation" is used without definitional assistance, except as found in U.C.C. section 2-609(1)'s first sentence stating, "A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired." But using this sentence in U.C.C. section 2-609 has not persuaded the courts to adopt it as a definition of repudiation for U.C.C. section 2-610.<sup>151</sup>

Although intended as a means of avoiding the reluctance of the courts to take a commercial view of repudiation, U.C.C. section 2-609 is not structured to be that helpful. Yet the comment to U.C.C. section 2-610 seems to treat insecurity as an entirely separate problem from anticipatory repudiation. U.C.C. section 2-609 revels in loose terms, starting with "reasonable grounds for insecurity," "adequate assurances," and a right pending receipt of demanded assurances to suspend performance "if commercially reasonable," all to be determined by "commercial standards." After sending the demand for assurances, the sender must await "a reasonable time not exceeding thirty days" before a failure to provide will constitute a repudiation. Even then it is only a repudiation if there was a justified demand.

Yet courts, as in *UMIC Government Securities Inc. v. Pioneer Mortgage Co.*<sup>152</sup> and *Bill's Coal Co. v. Board of Public Utilities*,<sup>153</sup> by ruling that the appropriate remedy was not to claim anticipatory repudiation but to move by way of U.C.C. section 2-609, seem to treat that section as a necessary way station on the way to U.C.C. section 2-610. This approach can be taken too far. Where the action or communication relied on to create an insecurity is one that could be dispelled by a brief discussion or investigation and this has not been done, it should be ruled that no reasonable ground for insecurity existed. In *In re Coast Trading Co.*,<sup>154</sup> there was a fear that one supplier would not honor the seller's order to ship to the buyer. Since the seller had other suppliers who could deliver the goods, the fear about one supplier was held not to be a reasonable ground for insecurity. Alternatively, the court said that buyer had been given assurances and had not objected to them as inadequate until seller, in reorganization, had filed an application for authority to assume the contract. Equally,

151. The statement in U.C.C. § 2-610 comment 1 (1978) that weighs against using § 2-609's first sentence as a definition is the one that says "anticipatory repudiation centers upon an overt communication of intention or an action which renders performance impossible or demonstrates a clear determination not to continue with performance." This is a return to the pre-Code common law formulation with its emphasis on "impossibility" and the "clearness" of the determination not to perform.

152. 707 F.2d 251, 36 U.C.C. Rep. Serv. (Callaghan) 149 (6th Cir. 1983).

153. 682 F.2d 883, 34 U.C.C. Rep. Serv. (Callaghan) 166 (10th Cir. 1982).

154. 26 Bankr. 737, 35 U.C.C. Rep. Serv. (Callaghan) 1180 (Bankr. D. Or. 1982); *see also* *Ross Cattle Co. v. Lewis*, 415 So. 2d 1030, 34 U.C.C. Rep. Serv. (Callaghan) 913 (Miss. 1982).

when claimed as an excuse for nonperformance, U.C.C. section 2-609 does not suspend the obligation to perform when there was no prior written demand for assurances and no contractual agreement for a security interest.<sup>155</sup>

The facts in *UMIC*<sup>156</sup> presented a situation very similar to the example mentioned in the third paragraph of comment 3 to U.C.C. section 2-609 of a buyer's falling behind in his payments "even though the items involved have to do with separate and distinct contracts." The purpose of requiring a request for further assurances is that there can be an explanation for the conduct that is inconsistent with a refusal to perform the contract. Taking a legal position, even though questionable about the proper interpretation of a termination clause, as in *Bill's Coal*,<sup>157</sup> is an assertion of a right. It is not a manifestation of nonperforming intent, although if acted upon and later it were determined that the interpretation was incorrect, there would be a breach.

A narrow point under Mississippi law was at issue before the Fifth Circuit in *Louis Dreyfus Corp. v. Brown*,<sup>158</sup> it divided the three-judge panel. There were two contracts by growers to deliver soy beans. Poor weather conditions drastically reduced the crop, and buyer sued. On appeal the defendants conceded that the poor weather conditions did not excuse their performance. The contracts were at an average price of \$7.28 per bushel for an aggregate of 30,000 bushels. On December 8, 1980, with delivery scheduled for December 12th, there was a telephone conversation in which both parties were aware that the growers were over 20,000 bushels short. On that same day plaintiff purchased, as cover, 20,000 bushels at \$8.34½ per bushel. The next day, the balance of the shortage was covered at \$7.84 per bushel. The buyer, therefore, claimed damages of \$21,656.00 plus interest.

The issue apparently was whether the defendant repudiated in the December 8th conversation. It was clear in that conversation that defendants did not have the beans to deliver. One can suppose the issue was whether, to constitute a repudiation, the defendants had to indicate that they would not buy beans in place of the lost crop. There were two versions of the conversation given at the trial, the defendants' being that there was to be a meeting to determine how the discrepancy would be settled.

One suspects the real battle, not faced by the majority of the panel, was over who was to purchase the cover. A bit of arithmetic indicates that 20,000 bushels purchased at \$8.34½, or at \$1.06½ above the contract price, account for \$21,300 of the damages, so that only 635 bushels were purchased at \$7.84 the next day. If defendants had purchased all 20,635 bushels at \$7.84 per bushel, the cost of performing the contract would have been only \$11,555.60 or a saving of \$10,100.40 in damages and, of course, the interest would have been just over half of what it was. The opinion does not disclose whether the market continued

155. *Automated Energy Sys., Inc. v. Fibers & Fabrics of Georgia, Inc.*, 298 S.E.2d 328, 35 U.C.C. Rep. Serv. (Callaghan) 818 (Ga. Ct. App. 1982).

156. 707 F.2d 251, 36 U.C.C. Rep. Serv. (Callaghan) 145 (6th Cir. 1983).

157. 682 F.2d 883, 34 U.C.C. Rep. Serv. (Callaghan) 166 (10th Cir. 1982).

158. 709 F.2d 898, 36 U.C.C. Rep. Serv. (Callaghan) 522 (5th Cir. 1983).

to drop so that there was, on December 12th, no difference in the market price, or whether purchases could have been made at less than the market. One can suspect the latter as defendant at trial, in testimony quoted by the court, stated that the purpose of the subsequent discussion was "'[w]e were going to get together and either pay him or him pay us what the difference was on our contracts that we were short on.'"<sup>159</sup>

The latter suggestion seems supported by the fact that the jury found for the defendants. The trial court sustained a motion for judgment for \$21,656 plus interest notwithstanding the verdict. The appellate court treated the issue as being whether there was any evidence to support the implicit jury finding that there was no repudiation in the telephone conversation and so no breach on the day fixed for the performance. The majority discussed the evidence and joined with the trial judge in treating the telephone conversation as clearly indicating no delivery when due, and only a desire for a financial discussion. The dissenting judge's opinion was that even if the defendant had given two versions of the telephone conversation in testimony, the jury verdict based on believing one version could not be reversed.

But from a commercial view was not the real issue, when the growers came up short, whether the merchant-buyer or the seller-grower could most efficiently effect cover with respect to the buyer's resale needs? The Code offers the aggrieved party great flexibility. It can await performance by the repudiating party for a commercially reasonable time, or it can use any and all breach remedies even if it has notified the repudiating party that it would await performance and has urged retraction. It can also suspend its own performance. But this very flexibility is based on the underlying realization that its own best interests will cause the aggrieved party to take the course of action it believes will leave the least amount of dollars to the risk of litigation. That decision, when made, should not be the victim of judicial twenty-twenty hindsight.<sup>160</sup> But before taking such a stance, it should be established that there has been a repudiation. Is not this a question of fact?

*Wahnschaff Corp. v. O.E. Clark Paper Box Co.*,<sup>161</sup> however, illustrates that a failure to act after an anticipatory repudiation, if one was made, can lose an aggrieved party the benefits of claiming a right to suspend performance. The machines ordered by the buyer were to be delivered within five to six months from the placing of a firm order. The buyer had not received the machines some twenty-five months after the order was placed and nineteen months after buyer tendered the completed down payment. The buyer had attempted to cancel nine months after placing the order, but the manufacturer said it could not cancel. One year later, the buyer asked for adequate assurances, but even after that the parties proceeded as if no such request had been made. Finally the buyer sued

159. *Id.* at 903, 36 U.C.C. Rep. Serv. at 529.

160. At least one member of the Committee feels the dissent in *Louis Dreyfus Corp.* has the better position and that a repudiation must be by an unequivocal act indicating a lack of intention to perform or by an improper response, or no response to a U.C.C. § 2-609 demand for assurances.

161. 304 S.E.2d 91, 36 U.C.C. Rep. Serv. (Callaghan) 1186 (Ga. Ct. App. 1983).

for return of the purchase price, or damages for non-delivery. The seller defended on the ground that the buyer's attempt to cancel was an anticipatory repudiation suspending the seller's obligation to perform. The court ruled that the lengthy intervening period of inaction by either party was equivalent to a U.C.C. section 2-611 retraction of the repudiation and rejected the seller's defense, affirming a money judgment for the buyer except for a sum of \$3,622 allowed as litigation expense. This amount was ordered stricken from the judgment.

No annual survey would be complete without reference to at least one case involving either a buyer's or a seller's attempt to avoid an unexpectedly burdensome defense by claiming impracticality under U.C.C. section 2-615. *Roth Steel Products v. Sharon Steel Corp.*<sup>162</sup> was such a case involving a contract for the sale of fixed quantities of steel at fixed prices. The prices and quantities were to be effective for the calendar year 1973. In early 1973, due to raw-material shortages and increased demand, the seller indicated to its buyers that it would sell no more steel except at modified prices. The buyers were unable to replace the seller's supply and agreed to modifications. Nevertheless, in an effort to reduce its backlog of orders, pursuant to an internal policy, the seller refused several purchase orders issued by the buyer in October and December 1973.<sup>163</sup> In 1974, the parties proceeded on an order-by-order basis, but again the seller breached several contracts by late deliveries or failure to deliver.

Plaintiff Roth sued for damages and was awarded \$555,968.46 on the theory that Sharon had not acted in good faith in obtaining the modification! Plaintiff was denied prejudgment interest. Sharon's counterclaim for the price of certain rejected steel was dismissed.

The seller's first line of defense was that it properly increased prices because the parties had modified their original contract to reflect changed market conditions. But the proof showed that the seller had adamantly refused any performance in the absence of an increase. The court adopted a two-pronged test as to the validity of the modification. First, the issue was whether the parties' conduct was consistent with "reasonable commercial standards of fair dealing in the trade," and second, whether the parties were, in fact, motivated by an honest desire to compensate for commercial exigencies. The finding of a lack of honesty on Sharon's part was based on its refusal to sell any steel at all to plaintiff if it refused to agree to the increased prices. Sharon's argument that it was justified in its stand by reason of certain provisions in correspondence between the parties was rejected because the theory was not evident in any of Sharon's pretrial actions. Thus, the trial court's finding of bad faith could not be reversed as clearly erroneous.<sup>164</sup>

162. 705 F.2d 134, 35 U.C.C. Rep. Serv. (Callaghan) 1435 (6th Cir. 1983).

163. The seller had instituted a policy called "blanking." It would refuse to accept all orders for delivery in certain "blanked" months, using the production of those months to fill overdue shipments.

164. 705 F.2d at 148, 35 U.C.C. Rep. Serv. at 1456.



The court next dealt with the seller's defense of commercial impracticability. The seller argued that an unforeseeable raw-material shortage occurred; but the court ruled that with knowledge of the shortage, Sharon continued to accept an unprecedented amount of orders. Hence, the impracticability was caused not by the shortage, but by Sharon's acceptance of orders when it knew the shortage would prevent the filling of the orders.

Impracticability was also offered as an excuse for the seller's failure to deliver as agreed in 1974. Once again the seller's conduct negated the defense. Since performance was only partially impractical, under U.C.C. section 2-615(b) the seller was required to devise a "fair and reasonable" system of allocation. A system of allocation was established in 1973, but in February or March 1974, Sharon began diverting steel to a wholly owned subsidiary warehouse "for the purpose of avoiding price control."<sup>165</sup> But Sharon failed to show that the subsidiary was a regular customer or otherwise within the class of permissible participants when the allocation system was established. Hence, unwaived delays in delivery constituted unexcused breaches of contract.

One concluding observation may be made. The court apparently limited participants in the allocation to those that were active customers when the system was established. But as long as the allocation systems are fair, is there anything in the Code that precludes a change in allocation systems and the establishment of a quota for a new entrant if its requirements can be properly estimated and then proportionately reduced? Or is it the policy of the Code that in times of shortage new customers may not be accepted?<sup>166</sup>

## **REMEDIES**

Any discussion of remedies for breach of a contract of sale, from an efficiency point of view, must divide the seller's remedies into two classes, goods-oriented and money-oriented. Goods-oriented remedies, if successful, result in the seller gaining a return of its goods unless to do so runs afoul of the Bankruptcy Act, the buyer having gone bankrupt. Money-oriented remedies result in a money judgment with an ensuing hassle of collecting the judgment from a recalcitrant or financially troubled debtor. Choosing between a goods-oriented remedy or a money-oriented remedy is one place where the business person appears to abandon the usual war cry of "Go for the money!" Goods-oriented remedies are thought to yield money sooner and in greater quantity when the seller controls the realization sale.

Two goods-oriented sellers' remedies are found in the Code. U.C.C. section 2-507(2) states what is left of the old cash sale doctrine, rather laconically stating that the buyer's "right as against the seller to retain or dispose of [the

165. *Id.* at 151, 35 U.C.C. Rep. Serv. at 1460.

166. A further question is whether, should a customer with an allocation cease being a customer, the allocation can be shifted to an entirely new customer.

goods] . . . is conditional upon his making the payment due."<sup>167</sup> The good news is that the section does not require that the buyer be insolvent. The bad news is that no procedure for recovery or time limit for demand is fixed in the text of the statute. Comment No. 3 to U.C.C. section 2-507, however, attempts to fill the gap by stating that the words "right as against the seller" are "words of limitation to conform with the policy set forth in the bona fide purchase sections of this Article." The comment then concludes, "The provision of this Article for a ten day limit within which the seller may reclaim goods delivered on credit to an insolvent buyer is also applicable here," when, in fact, the referenced section, U.C.C. section 2-702, requires only a demand in that time.

This last bit of legislation by comment was too much for the California Court of Appeals in *Citizens Bank of Roseville v. Taggart*,<sup>168</sup> a case involving the conflicting claims of a cash seller and a bank as lien creditor on a defaulted loan. The car was sold on May 20, 1982, for a cash price paid by a check which bounced after the buyer had received the vehicle and a certificate of ownership. When the bank received its judgment it caused the sheriff to levy on the purchased automobile in early September 1982. On September 10, 1982, the car seller filed a third-party claim. The court noted that the First and Fifth Circuits had adopted the ten-day rule<sup>169</sup> on the premise that the ten-day rule provided a more certain guide than the common law yardstick of reasonableness. The California court preferred the approach of the Eighth Circuit and several legal writers that text controlled the comment.<sup>170</sup> The court was impressed by the suggestion that many cash sellers would not learn of a dishonored check until the ten days from delivery had lapsed. How accurate this conclusion is in view of the present speedup in local check collections, and how often sellers take out-of-town uncertified checks, were not discussed.

Having decided that the last sentence of the comment did not control the text, the court, without mentioning the comment, gave the reclaiming cash seller priority over the lien creditor under U.C.C. section 2-403 and the pre-Code common law. The trial court's finding for the seller required the appellate court to "presume the court below determined the seller had acted within a reasonable time." Again without any factual foundation of business practices, the court asserted, as other courts and writers have, that the ten-day rule would cause cash sellers to act like credit sellers, that is, to accept only certified checks or insist upon security interests. Apparently it was felt that the judgment-lien creditor, over whom the reclaiming seller has priority if acting within a

167. See U.C.C. § 2-511(3) (1978) (stating that as between the parties payment "is defeated . . . by dishonor of the check on due presentment").

168. 191 Cal. Rptr. 729, 36 U.C.C. Rep. Serv. (Callaghan) 529 (Cal. Ct. App. 1983).

169. Szabo v. Vinton Motors, Inc., 630 F.2d 1, 29 U.C.C. Rep. Serv. (Callaghan) 737 (1st Cir. 1980); *In re Samuels & Co.*, 526 F.2d 1238, 18 U.C.C. Rep. Serv. (Callaghan) 545 (5th Cir. 1976).

170. Burk v. Emmick, 637 F.2d 1172, 29 U.C.C. Rep. Serv. (Callaghan) 1489 (8th Cir. 1980); J. White & R. Summers, *supra* note 129, at 115; Dugan, *Cash Sale Seller Under Articles 2 and 9 of the Uniform Commercial Code*, 8 U.C.C. L.J. 330 (1976); Note, *The Rights of Reclaiming Cash Sellers When Contested by Secured Creditors of the Buyer*, 77 Colum. L. Rev. 934 (1977).

reasonable time, presents a greater danger than the bona fide purchaser, a term including a secured party<sup>171</sup> who obtains immediate priority. That latter priority does not seem to have triggered the feared reaction from the cash sellers, but we, too, have no factual foundation for such a conclusion.

Bankruptcy cases involving a seller's right of reclamation, usually under U.C.C. section 2-702, show no sign of abating. In an insolvency context, one issue that has been frequently litigated is whether Congress intended section 546(c) of the Bankruptcy Code to be the exclusive remedy for reclaiming sellers. In *Ecolotec, Inc. v. Deephouse Equipment Co.*,<sup>172</sup> a seller, claiming an express fraudulent representation, sought to have a constructive trust imposed upon identifiable proceeds of goods sold to the bankrupt. The alleged fraudulent representation was that Deephouse had not yet received payment for the sale of a Vacu-sweeper to Danbury and that payment was imminent. The seller did not allege a demand for reclamation within ten days. The case was before the court on a motion to dismiss seller's complaint for failure to state a cause of action. The seller's theory was that property obtained by fraud did not become part of the debtor's estate. The court ruled that whether a seller relies on U.C.C. section 2-702 or a common law theory, compliance with the ten-day requirement in section 546(c) of the Bankruptcy Code is a pre-condition to any reclamation. The court implies, in the course of its opinion, that under no circumstances would a seller be permitted to recover the proceeds of sold goods. This holding would now preclude rescission for common law fraud under U.C.C. section 2-721 if the breaching party was in reorganization.

Another goods-oriented remedy of a seller is seller's right of stoppage in transit. Reclamation from a bankrupt buyer is possible if the seller can satisfy the requirements of section 546(c). But the seller would much prefer, if the buyer is insolvent, that the buyer never receive the goods. The seller, if possible, could use U.C.C. section 2-705, which permits a seller to stop delivery of goods in the possession of a carrier or other bailee when he discovers the buyer to be insolvent. At issue in *National Sugar Refining Co. v. C. Czarnikow, Inc.*<sup>173</sup> was whether, when title had passed to the buyer, the seller's exercise of its right of stoppage after the buyer's bankruptcy was subject to objection of any one of three grounds. First, did it constitute a "statutory lien" under section 545 of the Bankruptcy Code? Second, did it result in the creation of an interest in seller's favor subordinate to the rights of the debtor in possession under section 544(a) of the Bankruptcy Code? Third, was the stoppage a violation of the automatic stay provisions of section 362(a) of the Bankruptcy Code?

In the court's view, the right of stoppage was not impaired by the buyer's bankruptcy on any of the three theories. In reaching this conclusion, the court relied principally on section 546(c). It wrote:

171. U.C.C. § 1-201(33) and (32) (1978).

172. 35 U.C.C. Rep. Serv. (Callaghan) 147 (Bankr. D. Conn. 1982).

173. 35 U.C.C. Rep. Serv. (Callaghan) 821 (Bankr. S.D.N.Y. 1983).

In the light of this provision's denial of the avoidance powers conferred on a trustee under Bankruptcy Code §§ 544(a) and 545 as against a seller who delivers goods and then reclaims, we find it hardly likely that Congress intended to grant these very same powers as against a seller who succeeds in "reclaiming" the goods *prior* to delivery, by means of stopping them in transit.<sup>174</sup>

The court disposed of the argument that seller's stoppage violated the automatic stay by stating:

As a practical matter, establishing as a prerequisite to such exercise an application for relief would in many instances effectively deny to the seller the right of stoppage, in light of the often short period between the filing of the petition and actual or constructive delivery of the goods during which the right must be exercised. Stoppage in transit, as opposed to any disposition of the goods so stopped should be viewed as analogous to the written demand required of a reclaiming seller under Code § 546(c).<sup>175</sup>

High interest rates in the money market have had an impact on monetary damage awards, as it is felt that statutory interest at the judgment rate does not always place the seller in the position it would have been in had the buyer performed.<sup>176</sup> Thus, in *Bulk Oil (U.S.A.), Inc. v. Sun Oil Trading Co.*,<sup>177</sup> the U.S. Court of Appeals for the Second Circuit was faced with the breakdown of a \$4 million sale of fuel oil. Sun, the buyer, accepted the oil but refused to pay. Bulk won a summary judgment for the contract price in which the question of incidental damages was left for further consideration. In order to perform the contract, Bulk had borrowed "almost all of the cost from Chase Manhattan Bank."<sup>178</sup> Upon its further consideration, the district court awarded Bulk, as incidental damages, the amount of the post-breach interest payments to Chase and then awarded interest at the statutory rate on both the incidental damages and the full contract price. Sun appealed on the ground that statutory interest was all the compensation for the use of money to which Bulk was entitled. Not so, replied the court. The New York Court of Appeals had allowed, in a U.C.C. section 2-708 case, "finance charges incurred as incidental damages." The fact that this suit was under U.C.C. section 2-709 made no difference. The New York Court of Appeals had mentioned that the comment to U.C.C. section 2-710 has stated that the section intends to allow "all commercially reasonable expenditures made by the seller."<sup>179</sup> Thus the listing in U.C.C. section 2-710 of "any commercially reasonable [costs] incurred in stopping delivery, in the

174. *Id.* at 828.

175. *Id.* at 831-32.

176. Placing the aggrieved party in this position is the thrust of U.C.C. § 1-106(1) (1978).

177. 697 F.2d 481, 35 U.C.C. Rep. Serv. (Callaghan) 23 (2d Cir. 1983).

178. *Id.* at 482, 35 U.C.C. Rep. Serv. at 24.

179. *Neri v. Retail Marine Corp.*, 285 N.E.2d 311, 334 N.Y.S.2d 165, 10 U.C.C. Rep. Serv. (Callaghan) 950 (N.Y. Ct. App. 1972). *Accord* under U.C.C. § 2-706(1). *Intermeat, Inc. v. American Poultry, Inc.*, 575 F.2d 1017, 23 U.C.C. Rep. Serv. (Callaghan) 925 (2d Cir. 1978).

transportation, care and custody of the goods, after the buyer's breach, . . ." was not intended to be an exclusive listing.<sup>180</sup>

When it came to the award of statutory interest, however, the court affirmed the award of statutory interest on the post-breach interest payments, but reversed as to statutory interest also on that portion of the purchase price covered by the principal amount of the Chase Bank loan, as this would be a double recovery for the loss of use of money. The interest award on the excess of price over the loan was affirmed.

In *Schiavi Mobile Homes, Inc. v. Gironda*,<sup>181</sup> the Supreme Judicial Court of Maine allowed a recovery of floor-plan interest, but no recovery at the floor-plan rate for the period after the plaintiff paid off the loan. However, the judgment did include a statutory interest amount.<sup>182</sup>

These cases show a growing realization that statutory or judgment rates of interest do not compensate unpaid sellers for lost opportunity costs occasioned by a failure to pay money. At times of low market interest rates, a fixed statutory rate will overcompensate and at times of high money costs a fixed statutory rate undercompensates. Further, as studies of the problems by our Canadian neighbors<sup>183</sup> have indicated, any attempts to tie the so-called judgment rate to a market rate would not be appropriate. A market rate is largely composed of two elements. One is the "real interest rate," or cost of money. The other is compensation for erosion of money values caused by the lender's anticipation of future inflation. Thus the formula for a variable statutory rate, according to the studies, should take account of the actual erosion of inflation over the period of nonpayment, plus the real interest rate for the period. When, as in *Bulk Oil*, there is an actual unpaid loan, the compensation for delay in payment of the principal sum should be limited to the actual interest paid. Fixed statutory rates also have the disadvantage that changes are subject to legislative priorities and time tables. They are thus unresponsive to actual market variations.

The *Schiavi* case is also interesting for two other points. The first is that the court found that the duty to mitigate damages, although not explicit in the Code, survived the enactment of the Code under U.C.C. section 1-103 and could be implied from the Code's broad principles of good faith and fair dealing. This result, the court said, comported with the statement in comment 1 to U.C.C. section 1-106 that "damages must be minimized." The principle was applicable in *Schiavi*, because buyer-defendant's father had said in September that he would buy the mobile home from the purchaser if his son could not. The seller's

180. *Accord* Metropolitan Transfer Station, Inc. v. Design Structures, Inc., 328 N.W.2d 532 (Iowa Ct. App. 1982), applying rule by analogy to the defective structure of a garbage transfer station.

181. 463 A.2d 722, 36 U.C.C. Rep. Serv. (Callaghan) 1190 (Me. 1983).

182. In footnote 1 the court said the lower court awarded \$500 in interest, costs and attorney's fees.

183. See Manitoba Law Reform Commission, Report on Prejudgment Compensation on Money Awards (Jan. 4, 1982, Rept. No. 47) at 34-60.

unreasonable failure to pursue this solution violated the duty to mitigate damages and precluded any recovery for losses accruing thereafter.

The second point was that the plaintiff had not proved a case for recovery as a lost-volume seller by its sale, two months after the conversation with the father, at a price \$1,028.69 less than the father had offered. A sale to the father clearly could be made only to cover the son's default. Hence, such a sale would not have supported a lost-profits, lost-volume seller recovery.<sup>184</sup>

A section of some interest to buyers is U.C.C. section 2-711(3). It is one of the few goods-oriented remedies for buyers. A buyer who rightfully rejects a tender is given a security interest in goods in its possession or control to secure the repayment of payments made and expenses incurred in the handling of the goods. As a secured party, the buyer is entitled to resell the goods and recover from the proceeds the difference between the resale price and the amount of the secured debt. In a case reminiscent of some decisions involving a secured party's disposition of collateral under article 9, the New Mexico Supreme Court held that a buyer's resale that did not comply with the terms of U.C.C. section 2-706 precluded the buyer from recovering the balance owed by the seller. In *Deaton, Inc. v. Aeroglide Corp.*,<sup>185</sup> the facts showed: the sale occurred nearly two years after the rejection during which time, due to outdoor storage, the goods deteriorated; the buyer failed to give the seller notice of the sale; the buyer rejected the seller's refund offer of \$21,736.39, and then resold for \$9,200; and the buyer apparently sought no other bids before accepting the low sales price two years after refusing seller's refund offer. One justification offered for the article 9 rule of no deficiency judgment is that the secured party considered the collateral to be worth more than the loan or the loan would not have been made. (There are three prevailing rules governing the position of a secured party after a nonconforming sale.)<sup>186</sup> But the situation of a selling buyer is different. The goods were rejected because they were nonconforming. In the case before the court, the finding of the trial court was one of substantial impairment.<sup>187</sup> Hence, there was no previous value of the actual goods delivered by the seller. On the other hand, the recovery of any deficiency by the buyer, under the express provisions of U.C.C. section 2-706, is subject to the clause "[w]here the resale is made in good faith and in a commercially reasonable manner, the [buyer] may recover the difference . . ."; whereas U.C.C. section 9-507 speaks of recovery by the debtor of a loss caused by the failure to make a commercially reasonable sale. A buyer retaining rejected goods is not restricted to the remedy of resale. The buyer can elect to sue for the difference between the amount of the market value

184. The *Schiavi* case, at n.6, gives a good listing of lost-volume cases and of the literature thereon.

185. 657 P.2d 109, 35 U.C.C. Rep. Serv. (Callaghan) 130 (N.M. 1982).

186. They are: no deficiency judgment allowed; collateral is presumed worth the debt, but secured party can prove fair market value was less; and buyer must prove damages caused by lack of commercially reasonable sale.

187. The New Mexico Supreme Court pointed out that proof of a substantial impairment was not required under a rejection, only for a revocation of acceptance. 657 P.2d at 113, 35 U.C.C. Rep. Serv. at 136.

of the goods accepted and the value they would have if they had been as warranted under U.C.C. section 2-714 or, after a rejection, may recover damages for nondelivery. As specifically stated, the buyer is entitled to recover as much of the price as has been paid,<sup>188</sup> with an adjustment for the seller's damages from any improper sale. But no evidence of values was introduced by plaintiff in the *Deaton* case; hence, there was no basis for any recovery.

The other buyer goods-oriented remedies of specific performance, replevin under U.C.C. section 2-716, and the right to goods on seller's insolvency, spawned no significant cases<sup>189</sup> since the last annual survey.

In *Bogner v. General Motors Corp.*,<sup>190</sup> the buyer of a new Buick in the Bronx lost three vacation days when forced to await the arrival of necessary parts after a breakdown in Nova Scotia. Plaintiff sued for emotional harm. The court had to decide whether any recovery was possible in view of the exclusion of "payment" for loss of use of the car during warranty repairs. The warranty provided that the exclusion included "lodging bills, car rentals, other travel costs or loss of pay." But the warranty exclusion was headed "WHAT IS NOT COVERED" and the quoted language was in an item designated "EXTRA EXPENSES."

The court granted recovery under a three-stage reasoning process. The court considered first whether damages for emotional harm can be recovered in a contract action under the usual foreseeability test. It concluded that such damages were foreseeable, relying on the nature of the automobile and the warranty booklet's provision that warranty service was offered by any Buick dealer and that in case of breakdown one should go to the nearest Buick dealer. The court concluded "We live only in time, time lost is irreplaceable."<sup>191</sup> The judge, in the second stage, applied the rule of contra proferentem and determined that consequential damages had not been excluded by any general provision and that only expenses, not damages for emotional harm, were expressly excluded. Third, he considered whether contract law itself excluded this type of damages. Noting that usually "damages for emotional injury are not recoverable in a breach of contract action unless a separate tort has accompanied the breach,"<sup>192</sup> the court considered that the lack of any remedy for the plaintiff and a public policy in favor of some form of damages to serve as an incentive for prompt warranty service, supported a recovery. The plaintiff was, therefore, given a \$200 judgment.

188. *Royco, Inc. v. Cattengim*, 427 So. 2d 759, 35 U.C.C. Rep. Serv. (Callaghan) 465 (Fla. Dist. Ct. App. 1983) (no need to prove no adequate remedy at law under the Code for rescission).

189. *Carey Aviation, Inc. v. Giles World Marketing, Inc.*, 29 Bankr. 523, 36 U.C.C. Rep. Serv. (Callaghan) 475 (Bankr. D. Mass. 1983) (buyer not in possession of partially paid for Varba airplane, even if buyer in ordinary course, must establish a goods oriented remedy. Here seller not insolvent until more than 10 days after payment; no uniqueness or other special circumstances and no showing of inability to cover).

190. 459 N.Y.S.2d 679, 35 U.C.C. Rep. Serv. (Callaghan) 466 (N.Y. Civ. Ct. 1982).

191. *Id.* at 680, 35 U.C.C. Rep. Serv. at 468.

192. *Id.* at 681, 35 U.C.C. Rep. Serv. at 470.

One issue which continues to reappear, and upon which courts have disagreed, is what effect is to be given to a consequential damages disclaimer if it is determined that an exclusive remedy has failed of its essential purpose. U.C.C. section 2-719(2) provides that in such a case "remedy may be had as provided in this Act." Does that mean that a buyer is then entitled to recover consequential damages pursuant to U.C.C. section 2-715? The U.S. Court of Appeals for the Sixth Circuit, joining a majority of the decisions, has answered the question, under the law of the State of Washington, in the negative.<sup>193</sup> The court did not rule solely on the case count but considered the comments and applied principles of statutory construction to hold that to recover consequential damages in an action between merchants the plaintiff must prove that the provision was unconscionable. U.C.C. section 2-719(3) exclusively controlled the enforceability of the exclusion of consequential damages, overriding any implication from U.C.C. section 2-719(2).

Two other cases are worthy of note. One is *Maxfield v. Simmons*.<sup>194</sup> The issue involved was whether the four-year statute of limitations contained in U.C.C. section 2-725 was applicable where a builder of a house, constructed with defective trusses, sought indemnity from the supplier and manufacturer of the trusses after the statute had run. In a poorly reasoned opinion, the Illinois Supreme Court correctly recognized that U.C.C. section 2-725 "controls in causes of action based on contract principles but not in those causes of action based on tort principles,"<sup>195</sup> but then stated that the contract statute has no application to the indemnity cause of action.<sup>196</sup> Why? Because, said the court, although the obligation to indemnify arose from the contractual relationship between the parties, the cause of action is nevertheless grounded in tort. The effect of the case, therefore, is to preserve to an assembler sued in tort after the four-year statute had run as to the supplier's contract, the right to obtain indemnity or reimbursement from his suppliers. The result, as the court said, was to make the rule similar to its previous decision in products liability law where the assembler of a product is sued and seeks indemnity from the manufacturer of the component part.<sup>197</sup>

It almost seems that a plaintiff can have the benefit of whichever statute of limitations will prevent the suit from being barred. *Williams v. West Penn Power Co.*<sup>198</sup> involved a suit brought more than two years after the injury occurred but less than four years after the purchase of the defective product, namely, scaffolding equipment. The injury occurred on the date of the first use, and personal injuries were suffered by the purchaser and by his employee. The

193. *Lewis Refrigeration Co. v. Sawyer Fruit, Vegetable & Cold Storage Co.*, 709 F.2d 427, 36 U.C.C. Rep. Serv. (Callaghan) 170 (6th Cir. 1983).

194. \_\_\_\_ N.E.2d \_\_\_\_, 36 U.C.C. Rep. Serv. (Callaghan) 553 (Ill. 1983).

195. *Id.* 36 U.C.C. Rep. Serv. at 556.

196. *Id.* 36 U.C.C. Rep. Serv. at 556.

197. *Liberty Mut. Ins. Co. v. Williams Mach. & Tool Co.*, 62 Ill. 2d 77, 338 N.E.2d 857 (1975).

198. 467 A.2d 811 (Pa. 1983).



superior court, by a divided panel, had given the purchaser's claim for personal injuries the benefit of the four-year statute, but held that the employee's claim was barred by the two-year statute.<sup>199</sup> The Pennsylvania Supreme Court reversed as to the employee, holding that he, too, was entitled to the benefit of the four-year statute. Noting that Pennsylvania had adopted alternative A of U.C.C. section 2-318 so that statutory third-party beneficiaries were limited to members of the purchaser's household, Justice (now Chief Justice) Nix went to the comment to find that the statute was "neutral"<sup>200</sup> about the doctrine of privity and did not, therefore, preclude a court from demolishing any remaining vestige of the citadel.<sup>201</sup> The court stated that, in Pennsylvania, a plaintiff now has the option of suing in tort until the tort statute has run or suing in contract for breach of warranty if it has run but the four-year statute has not run. The court did not need to address the prompt notice requirement for breach of warranty discussed above.<sup>202</sup>

The cases illustrate the need to eliminate differences between causes of action in contract and those in tort which arise out of identical transactions, a problem now being discussed abroad,<sup>203</sup> and as also illustrated by the House of Lords decision this year in *Junior Books Ltd. v. Veitchl & Co.*,<sup>204</sup> where economic loss was recovered in a tort case.

The subject of cover under U.C.C. section 2-712 has spawned a few interesting decisions. In *McGinnis v. Wentworth Chevrolet Co.*<sup>205</sup> the Supreme Court of Oregon said that the cover remedy was not intended to apply beyond "those situations where the buyer has purchased or contracted to purchase goods as an actual replacement for" the agreed performance. Hence, the conditions of U.C.C. section 2-712 did not govern a suit for the return of the purchase price and incidental and consequential damages. Under that latter holding the court permitted recovery of the rental costs of a substitute vehicle,<sup>206</sup> but not under the concept of cover. Cover includes, under U.C.C. section 2-712(1), "any reason-

199. *Williams v. West Penn Power Co.*, \_\_\_\_ Pa. Super. \_\_\_\_, 460 A.2d 278 (Pa. Super. Ct. 1983).

200. Comment 3, before its change by the 1966 Amendments to the Code, read

This Section expressly includes as beneficiaries within its provisions the family, household and guests of the purchaser. Beyond this the Section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain.

The *Williams* opinion does not limit the neutrality to vertical privity, but extends it to horizontal privity. 467 A.2d at 817-18.

201. The court notes that at least 16 states have enacted "Products Liability Statutes" with their own statutes of repose. *Id.* at 817 n.18.

202. See *supra* text accompanying note 140.

203. Holyoak, *Tort and Contract after Junior Books*, 99 L.Q. Rev. 591 (1983).

204. 1983 A.C. 520.

205. 645 P.2d 543, 33 U.C.C. Rep. Serv. (Callaghan) 1315 (Or. Ct. App. 1982).

206. See *supra* text accompanying notes 5 and 193 for discussions of whether circumstances causing an exclusive or limited remedy to fail of its essential purpose (UCC § 2-719(2)) also cancel a limitation or exclusion of consequential damages.

able purchase of or contract to purchase goods in substitution for those due from the seller." The court looked at the definition of "purchase" in U.C.C. section 1-201(32) and found no mention of leasing or rental.

In the case of an anticipatory repudiation, an aggrieved buyer has a choice between cover under U.C.C. section 2-712 and the cost-or-market formula of U.C.C. section 2-713. Having chosen to cover, an aggrieved buyer should not be able to elect the cost-or-market formula just because it would yield greater damages than the below-market cover contract.<sup>207</sup>

In another anticipatory repudiation case, the buyer sought to include damages caused by the delayed arrival of the substitute goods at the construction site as added costs of cover. But just as a seller may not include overhead in the cost of a seller's resale, the court in *In re John Gruss, Co.*<sup>208</sup> refused to include "Field Overhead for 19 additional days" as a recoverable element. It did allow "Additional supervisory labor to reschedule laborers" and "Additional administrative costs to reschedule laborers," totaling \$5,753.68. The court did not allow "Field Overhead for 19 additional days" in the amount of over \$30,000, but only for the reason that it had not been demonstrated that the delayed delivery of the duct-work had delayed the completion of the buyer's entire contract by nineteen days.

The effect of delays not solely caused by a seller's breach was handled in a different way in *Fabrica Italiana Lavorazione Materie Organich'e S.A.S. v. Kaiser Aluminum & Chemical Corporation*.<sup>209</sup> The case involved a contract to sell a commodity called DAP, F.O.B. Tampa, Florida. Kaiser was to ship from Tampa, by a vessel to be nominated by plaintiff, with sufficient lead time before shipment in December 1979. In November plaintiff nominated the Soviet ship Belovodsk, but later learned that due to problems in Cuba, the Belovodsk could not arrive in Tampa before December 31. Thereupon plaintiff nominated a substitute Soviet vessel, the Uelen, scheduled to arrive in Tampa on December 29, 1979. Since there was a ten-day lag between arrival and berthing, Kaiser Aluminum, on December 28, 1979, cancelled the contract. This it was not entitled to do, as the nomination had occurred with adequate lead time, and so the cancellation constituted a repudiation.

The plaintiff immediately purchased cover for loading on the Uelen, but by the time the vessel, which arrived in the harbor as scheduled, reached the loading berth the International Longshoreman's Association had instituted a boycott of Soviet ships and refused to load the Uelen. After obtaining a non-Soviet ship to carry the DAP, the plaintiff sued for breach and the cost of cover. Kaiser's defense that had it not repudiated, it would not have been able to load the Uelen anyway was not successful. At the time of breach, December 28, 1979, the boycott was not in effect, and plaintiff was entitled to cover.

The more violent and rapid the market fluctuations in commodity prices, the greater is the need for some control over the recovery by a buyer, as shown in

207. See *infra* text accompanying notes 210-12.

208. 22 Bankr. 236, 34 U.C.C. Rep. Serv. (Callaghan) 1192 (Bankr. D. Kan. 1982).

209. 684 F.2d 776, 34 U.C.C. Rep. Serv. (Callaghan) 1193 (11th Cir. 1982).

*Milwaukee Valve Co. v. Mishawaka Brass Manufacturing, Inc.*<sup>210</sup> Here, while the original purchase was for materials for certain contracts, the buyer diverted deliveries ordered for other contracts to perform those certain contracts, and some months after the date for performance replenished the resultant depletion of inventory as cover.<sup>211</sup> Recovery of the cover price was allowed. The difference between the recovery on the market-price formula and the actual cost of postperformance replenishment of inventory should not be considered an over-compensation to the buyer. The option to choose between the cost of cover, if made, and the contract-market-price formula, should be fully preserved as to all preperformance-date covers even if higher than the market price at date of performance. The lead time for deliveries justifies this. It is a different issue whether option should remain after the date for performance has passed and it can be shown that cover could readily have been obtained at a lower price within a reasonable time after the buyer learned of the breach.<sup>212</sup>

## BULK TRANSFERS

The major interest in article 6 is the progress of efforts to improve its operation through redrafting. The scope and progress of that effort has, however, been reported previously in this publication.<sup>213</sup>

Three cases of some significance will be discussed. Two involve the problem of what constitutes sufficient "concealment" to toll the six months from the transfer date statute of limitations found in U.C.C. section 6-111. Substituted is the rule that each creditor of the transferor may bring an action or make a levy within six months after its discovery of the transfer. The cases reach opposite results. The third case involves the rights of a secured party of the transferor after a noncomplying transfer, an ensuing bankruptcy, and the appearance of competing creditors.

In *Columbia Rope Co. v. Rinek Cordage Co.*,<sup>214</sup> a divided panel of the Pennsylvania Superior Court ruled that a failure of the bulk transferee to give any notice at all to creditors was a concealment. On the other hand, in *Chartered Bank of London v. Diamant*,<sup>215</sup> the Ninth Circuit took the opposite view, but under a repealed provision of the California Code requiring a bulk sales notice in the case of a security interest. Here a bulk sales notice was published but was rendered immune from attack by the running of California's section 6111 one-year statute. California had, after the transfer, by an amend-

210. 319 N.W.2d 885, 34 U.C.C. Rep. Serv. (Callaghan) 15 (Wis. Ct. App. 1982).

211. There can be grave evidentiary difficulties for a seller in determining, when sued on a cost-market formula, whether a continually purchasing buyer did, in fact, cover.

212. See the discussions in Sebert, *Remedies Under Article Two of the Uniform Commercial Code: An Agenda for Review*, 130 U. Pa. L. Rev. 360 (1981); Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two*, 73 Yale L.J. 199 (1963).

213. See Hawkland, *Proposed Revisions to U.C.C. Article 6*, 38 Bus. Law 1729 (1983).

214. 461 A.2d 312, 36 U.C.C. Rep. Serv. (Callaghan) 922 (Pa. Super. Ct. 1983).

215. \_\_\_\_ F.2d \_\_\_\_, 36 U.C.C. Rep. Serv. (Callaghan) 1415 (9th Cir. 1983).

ment to its U.C.C., excluded security interests from the scope of article 6 and the court made much of this.

Both cases recognized a division of authority on the point, with no controlling prior decision in either California or Pennsylvania. The split of authority is not very extensive as yet,<sup>216</sup> and so a policy discussion may be useful.

The better policy would, perhaps, be to treat concealment as requiring an intent that creditors of the transferor should not know of the transfer. A total failure to comply, with no provision for creditors of the transferor and no indication of new ownership, should, however, give rise to an inference of concealment. Concealment should not be found when, as is often the case, certain debts are assumed by the transferee, the transferor agrees to pay off the others, a portion of the purchase price is escrowed to secure performance of that covenant, and there is no lack of general knowledge that there are new owners.

The modern justification for a bulk sales law lies in the recognition that a species of commercial fraud exists where a merchant converts tangible assets into intangible wealth which can easily be placed beyond the ability of creditors to reach with the usual creditor's post-judgment process. It is not really essential that the creditor disappear, just that the tangible assets transmute into those that are intangible and concealable. Creditors in such cases might be thought to need some pre-transfer notice. But the interests of buyers require a short statute of limitations. The Code extended its six months from the transfer limitation period, based not on a failure of pre-transfer notice, but on post-transfer concealment. Hence, some active hiding should be required.

In the third case, *National Bank of Texas v. West Texas Wholesale Supply Co.*,<sup>217</sup> a Fifth Circuit panel determined the extent of the security interests of three perfected secured parties where a bulk transfer of a gun shop's assets had occurred without compliance with article 6 of the Texas U.C.C.

The bulk transferor first created a security interest in all present and after-acquired inventory of the gun shop in favor of National Bank of Texas, which filed a U.C.C.-1 in a trade name which the panel ruled to be a sufficient perfection in this case. The subsequent bulk transferee purported to act as a partner in the enterprise in this transaction. About a year and a quarter later the bulk transferor, an individual, created a perfected secured interest in all inventory, proceeds, and accounts receivable and also all equipment, furniture, and fixtures used in the debtor's place of business.

216. The Ninth Circuit cited *Aerolineas Argentinas v. Hansen & Yorke Co.*, 12 U.C.C. Rep. Serv. (Callaghan) 329 (N.Y. Civ. Ct. 1973) as containing a dictum that noncompliance did not alone amount to a concealment and *E. J. Trum, Inc. v. Blanchard Parfums*, 33 A.D.2d 689, 306 N.Y.S.2d 316, 6 U.C.C. Rep. Serv. (Callaghan) 1261 (1969) (requiring a complete failure). 36 U.C.C. Rep. Serv. at 1420 n.7. The Pennsylvania Superior Court cited these and also *Aluminum Shapes, Inc. v. K-A-Liquidating Co.*, 290 F. Supp. 356, 5 U.C.C. Rep. Serv. (Callaghan) 1194 (W.D. Pa. 1968) (requiring "active" or "affirmative" concealment) and *McKissick v. Foremost-McKesson, Inc.*, 441 F.2d 811, 8 U.C.C. Rep. Serv. (Callaghan) 301 (5th Cir. 1971) for a dictum that failure to give notice is a concealment. 461 A.2d at 314-15, 366 U.C.C. Rep. Serv. at 925.

217. 714 F.2d 1316, 36 U.C.C. Rep. Serv. (Callaghan) 1473 (5th Cir. 1983).

Two weeks later the proprietor of the gun shop assigned all of his interest to Cynthia McBee, who had engineered the first secured transaction. In the bulk sales contract, she agreed to comply with article 6 of the Code but never did so. Two months and ten days after the bulk transfer, McBee sought and obtained a loan from Republic Bank, which was also perfected, covering "All accounts, contract rights . . . inventory . . . whether now owned or hereafter acquired."

The three perfected security interests each covered after-acquired property when, three months after the Republic loan, McBee filed in bankruptcy. The trustee in bankruptcy sold all of the inventory. The issue was over priorities in the distribution of the sum realized on the sale of the inventory.

The Uniform Fraudulent Conveyance Act (not at issue here) provides that the creditor of the transferor may pursue the property transferred except as against a bona fide purchaser,<sup>218</sup> but has no specific provision for attaching proceeds in the hands of the transferee. Unlike the Uniform Fraudulent Conveyance Act, the bulk sales article in U.C.C. section 6-105 makes a conveyance "ineffective" if the notice is not given. Therefore, in *National Bank of Texas*, the court was faced with determining what "ineffective" meant when applied to a conveyance of inventory, much of which had been sold and replaced by more recently purchased inventory. Unfortunately for Republic Bank, it did not have a purchase money security interest.

Rather than limiting the transferor's secured parties to tracing conveyed inventory, the court limited them only to the value of the transferred property. It then applied the rule of first to file.<sup>219</sup>

In a sense, the court adopted a compromise rule continuing the effect of the after-acquired property clause as to the property covered, but limiting its scope to the value of the property subject to the lien at the time of transfer.<sup>220</sup>

In its analysis of what was meant by making a noncomplying sale ineffective, the court implied that compliance and, perhaps, noncompliance with article 6 would subject a secured creditor to U.C.C. section 6-111's six months' limitation periods. This would not be the only situation in which secured parties are required to exercise some degree of diligence as to the collateral for the benefit of subsequent transferees from the debtor. The four-month rule of U.C.C. section 9-103(1)(d) is but one example. There are also the special rules as to future advances of U.C.C. section 9-301(4) and U.C.C. section 9-307(3). Further U.C.C. section 1-201(12) defines "creditor" as including "a general creditor, a

218. Uniform Fraudulent Conveyance Act, § 9, gives the following two remedies to a creditor whose claim has matured: "(a) Have the conveyance set aside . . . to the extent necessary to satisfy his claim, or (b) Disregard the conveyance and attach or levy execution upon the property conveyed." Section 10 provides that a creditor whose claim has not matured may, in a court of competent jurisdiction, "(a) Restrain the defendant from disposing of his property, (b) Appoint a receiver to take charge of the property, (c) Set aside the conveyance . . . , or (d) Make any order which the circumstances of the case may require." Selected Commercial Statutes, 1135 (West 1981).

219. U.C.C. § 9-312(5) (1978).

220. Some members of the Committee are of the opinion that the Fifth Circuit panel in *Nat'l Bank of Tex.* committed error on every holding in the case.

secured creditor, a lien creditor” and others. Hence, secured creditors are subject to article 6’s rules covering creditors.

The policy, in cases such as *National Bank of Texas*, requires that a balance be struck between the interest of the bulk transferee in freedom from prior claims and the interest of the secured party in new acquisitions. Historically the after-acquired property clause referred to property acquired by the debtor, not property acquired by a transferee, whether by merger or by bulk sale. A distinction can and should be made between a secured party’s property interest in the thing itself, which is transferred, and the interest, historically an equitable interest, in having the security interest attach to purchases made by one other than the debtor. The *National Bank of Texas* court’s solution to the balancing of interests is one as to which reasonable persons may differ.

## **WAREHOUSE RECEIPTS, BILLS OF LADING, AND OTHER DOCUMENTS OF TITLE**

The annual survey has for some years neglected article 7. While there is nothing startling in this year’s batch of cases, the decisions are not without some interest.<sup>221</sup>

### **NEGOTIABLE OR NONNEGOTIABLE DOCUMENTS**

The alternative holding of the bankruptcy judge in *Hodges v. Anderson*,<sup>222</sup> that warehouse receipts that apparently provided for delivery to George Kerr, Inc. “in its name” were negotiable because when endorsed in blank by the named person they became payable to bearer, will surprise some readers used to the magic words of “to order or to bearer” in article 3’s definition of a negotiable instrument. The receipts did bear a legend stating: “Under the Statute Laws of South Carolina, this receipt carries absolute title to the products herein described which will be delivered only upon presentation of this receipt and payment of all warehouse charges and expenses.”<sup>223</sup> The bankruptcy judge’s analysis was that U.C.C. section 2-701(1)(a) provided that a warehouse receipt is negotiable “if, by its terms the goods are to be delivered to bearer or to the order of a named person.”<sup>224</sup> He then read the definition of “bearer” in U.C.C. section 1-201(5) as including a person in possession of a document of title endorsed in blank, and buttressed his conclusion by the statement in U.C.C. section 7-202 in that a warehouse receipt need not be in any particular form. He concluded

221. See, Henson, *Some Problems Involving Documents of Title*, 43 Ohio St. L.J. 585 (1982), for some matters not here discussed.

222. 25 Bankr. 2, 35 U.C.C. Rep. Serv. (Callaghan) 1280 (Bankr. D.S.C. 1981), *aff’d on other grounds*, 35 U.C.C. Rep. Serv. (Callaghan) 1289 (4th Cir. 1982).

223. *Id.* at 6, 35 U.C.C. Rep. Serv. at 1284.

224. *Id.* at 7, 35 U.C.C. Rep. Serv. at 1285.

The warehouse receipts pledged to First National by the debtor were negotiable because they represented absolute title to the goods, were issued to the debtor, were endorsed by the debtor in blank and were delivered to First National. Since the goods represented by the receipts could be obtained only upon presentation and surrender of the receipts, the goods were to be delivered to the bearer of the receipts. The receipts thus meet the requirements of negotiability.<sup>225</sup>

The second paragraph of the comment to U.C.C. section 7-104 states that the clause requiring surrender is included by many bailees in nonnegotiable documents as a means of insuring a return of the documents. Thus it will come as a surprise to warehousemen issuing what they think are nonnegotiable receipts with the clause, that the receipt becomes negotiable when endorsed in blank.

Yet there is a negative implication that can be drawn from U.C.C. section 7-104(2) that will support the bankruptcy judge's conclusion.<sup>226</sup> Subsection (2) provides that a bill of lading with goods consigned to a named person is not made negotiable by such a clause. The negative inference is that a warehouse receipt would be. The comment refers to all bailees. Can a comment overcome a negative implication from the text?

In affirming the ruling of the bankruptcy judge that First National Bank had a perfected security interest, the circuit court of appeals discussed only the alternative ground that the bank had, in fact, perfected a possessory interest by notice to a bailee. Unfortunately, as to the negotiability of the warehouse receipts, the circuit court merely said "we find it unnecessary to reach this issue . . ."

### *FAILURE TO DELIVER AND LIMITATIONS OF LIABILITY*

Contractual limitations of liability continue to raise issues as to whether the conduct of the bailee transcends the limits of the protection afforded by U.C.C. section 7-204 for warehousemen and section 7-309 for carriers. Both sections permit limitations of liability except where the bailee has converted the bailed goods to its own use. This exclusion has resulted in litigation over conversion to the bailee's own use or other causes of the disappearance of goods. As may be expected, the litigation involves the extent of a plaintiff's required prima facie case and who has the burden of coming forward with explanatory evidence after proof of delivery and of failure to redeliver. During the period of this survey

225. *Id.*, 35 U.C.C. Rep. Serv. at 1285.

226. U.C.C. § 7-105's rule forbidding construction by negative implication, textually refers only to parts 2 and 3. Hence, the construction by negative inference is not textually barred as to U.C.C. § 7-104. Would a court using the rule of U.C.C. § 1-109, that section captions are a part of the Code, refuse to apply a negative implication throughout article 7 as the caption is not as limited as the text? This is very doubtful.

three courts discussed the issues,<sup>227</sup> usually raised by plaintiffs, relying on a 1980 decision of the New York Court of Appeals in *I.C.C. Metals, Inc. v. Municipal Warehouse Co.*<sup>228</sup> In that case, the court held the bailee liable in conversion where the bailee "suggested" theft as an excuse, but its evidence did not "make a sufficient showing in support of its suggested explanation of the loss."<sup>229</sup> The impact of the ruling by the New York Court of Appeals is that a plaintiff makes a prima facie case for conversion upon showing delivery and no goods available for return. The burden of coming forward with explanatory evidence then falls on the bailee, who satisfies that burden by proof of facts indicating negligent or nonnegligent loss,<sup>230</sup> whereupon the plaintiff bears the risk of nonpersuasion on its claim of conversion.

In *Joseph H. Reinfeld, Inc.*,<sup>231</sup> the New Jersey Superior Court, Law Division, followed the *I.C.C. Metals* case, also finding support in pre-Code cases from Missouri, Arkansas, California, and South Dakota.<sup>232</sup> Plaintiff bailor proved delivery, demand, and a shortage in the return. Three hundred thirty-seven cases of Chivas Regal Scotch whiskey were stored; only 297 were available for return. Liability in conversion was sustained against defendant's suggestion that only a presumption of negligence was shown. Defendant then proved a negligent misdelivery, which was held to be a conversion.

On the other hand, in *Inland Metals Refining Co.*,<sup>233</sup> the U.S. District Court for the Northern District of Illinois, applying Indiana law, declined to follow *I.C.C. Metals* in view of pre-Code Indiana precedent,<sup>234</sup> holding that an unexplained disappearance could give rise to an inference of negligence only. On the issue of negligence, the bailor asserted an equitable estoppel in that, long before the request for return was made, the warehouseman had indications of shortage. But the court held the proof failed to show essential elements of estoppel, that is, either a duty to disclose or any real knowledge of the disappearance of goods;

227. *Inland Metals Ref. Co. v. Ceres Marine Terminals, Inc.*, 557 F. Supp. 344, 36 U.C.C. Rep. Serv. (Callaghan) 266 (N.D. Ill. 1983); *Joseph H. Reinfeld, Inc. v. Griswold & Bateman Warehouse Co.*, 458 A.2d 1341, 36 U.C.C. Rep. Serv. (Callaghan) 262 (N.J. Super. Ct. 1983); and *Adams v. Ryan & Christie Storage, Inc.*, 563 F. Supp. 409, 36 U.C.C. Rep. Serv. (Callaghan) 930 (E.D. Pa. 1983).

228. 409 N.E.2d 849, 29 U.C.C. Rep. Serv. (Callaghan) 217 (N.Y. Ct. App. 1980); *Cf. Philipp Bros. Metal Corp. v. S.S. "Rio Iguazu,"* 658 F.2d 30, (2d Cir. 1981) applying the same rule in maritime law.

229. 409 N.E.2d at 853, 29 U.C.C. Rep. Serv. at 222.

230. This results from a reading of U.C.C. § 7-403(1), which provides that the bailee must deliver to the person entitled under the warehouse receipt unless one of the six specified excuses or the general "any other lawful excuse" is established by the bailee.

231. *Joseph H. Reinfeld, Inc. v. Griswold & Bateman Warehouse Co.*, 458 A.2d 1341, 36 U.C.C. Rep. Serv. (Callaghan) 262 (1983).

232. Cited were *American Express Field Warehousing Corp. v. First Nat'l Bank*, 346 S.W.2d 518 (Ark., 1961); *McAllister v. Cord Moving & Storage Co.*, 301 S.W.2d 852 (Mo. Ct. App. 1957); *George v. Bekins Van & Storage*, 205 P.2d 1037 (Cal. 1949); and *Allen v. Line*, 34 N.W.2d 835 (S.D. 1948).

233. *Inland Metals Ref. Co. v. Ceres Marine Terminals, Inc.*, 36 U.C.C. Rep. Serv. (Callaghan) 266 (N.D. Ill. 1983).

234. *Vandalia R.R. Co. v. Upton Nut Co.*, 101 N.E. 114 (1913).



nor did the court see any necessary reliance on the false assumption of a continued possession by the warehouseman.

Judge Pollak, in *Adams v. Ryan & Christie Storage, Inc.*,<sup>235</sup> was obliged to apply Pennsylvania law in a case where all counsel agreed "that there is no body of Pennsylvania case law that leads unerringly in one direction or another."<sup>236</sup> The goods in storage included some carpets of considerable value which were seen in the vault by plaintiff in 1977, but were gone in 1980. By stipulation, the parties agreed that nobody within the range of the judicial process of the court knew what had happened to the carpets. The limitation of liability clause was on a receipt, "which contained in small but not indecipherable language, a limitation of liability on the part of the warehouse to thirty cents per pound."<sup>237</sup> Judge Pollak stated that until the *I.C.C. Metals* case in New York and its progeny, the prevailing rule under the Code was that an unexplained disappearance permitted an inference of negligence, but not of conversion.<sup>238</sup> He concluded that since conversion was a willful tort, which he felt bordered on criminal conduct, it was not to be inferred from a totally unexplained disappearance.

Judge Pollak then raised the issue of the effect of the optional language in U.C.C. section 7-403(1)(b) following the provision giving the bailee the burden of establishing as an excuse for nondelivery that there was "damage to or delay, loss or destruction of the goods for which the bailee is not liable." In seventeen states, including New York, adopting the optional language or a variation thereof,<sup>239</sup> the clause is followed by "but the burden of establishing negligence in such cases is on the person entitled under the document." The added language has been attacked as wrong in policy.<sup>240</sup> Judge Pollak points out that the New York Court of Appeals made its decision

in the face of—I think 'in the teeth' is the proper phrase—in the teeth of exactly such language. In my view that fact only goes to cast some further doubt on the wisdom of the New York Court of Appeals in reaching the result it did, but that, of course, leads me to an essentially impertinent judgment, since whatever my competence may be as a trial judge to try to figure out what the law of Pennsylvania might be in a case where the Pennsylvania appellate courts have not spoken, I guess nobody has autho-

235. 563 F. Supp. 409, 36 U.C.C. Rep. Serv. (Callaghan) 930 (E.D. Pa 1983).

236. *Id.* at 441, 36 U.C.C. Rep. Serv. at 932.

237. *Id.* at 410, 36 U.C.C. Rep. Serv. at 931.

238. As illustrative, the judge cited *Sanfisket, Inc. v. Atlantic Cold Storage Corp.*, 347 So. 2d 647, 21 U.C.C. Rep. Serv. (Callaghan) 1155 (Fla. Ct. App. 1977). 563 F. Supp. at 411, 36 U.C.C. Rep. Serv. at 932.

239. The states are Arizona, Arkansas, California, Florida, Idaho, Indiana, Iowa, Kentucky, Maryland, Nevada, New York, North Carolina, Ohio, Oregon, Pennsylvania, Texas and Wyoming.

240. J. White & R. Summers, *supra* note 129, at § 203, 791.

rized me to set myself up as a critic of the New York Court of Appeals' construction of its Uniform Commercial Code.<sup>241</sup>

Notwithstanding his disclaimer, the good judge could not refrain from citing a law review note that also expressed some doubts as to the "merit of the decision from an analytic point of view."<sup>242</sup>

The issue between the two views is a narrow one and basically comes down to one of risk-sharing by contract. The limitation of liability of the warehouseman is dependent on the offering of protection at a greater value if, in effect, the bailor pays a premium for it.<sup>243</sup> If the warehouseman is regulated by a filed tariff, then any value above tariff limitations must be covered by the bailor's own insurance.

The states enacting the added language in U.C.C. section 7-403(1)(b) took the position that the discovery procedures available in the litigation process would enable plaintiffs to uncover evidence of a warehouseman's "conversion to his own use," and that the failure to deliver in the absence of the establishment of excuse should establish no more than a permissive influence which the trier of fact could draw, but should not be compelled to draw. In the absence of the optional additional language in U.C.C. section 4-403(1)(b), as adopted by the state whose law governs, the failure to deliver with no explanation forthcoming should result in a directed verdict on negligence. It is not clear whether this was Judge Pollak's result, or whether he drew the permitted inference in his capacity as a trier of fact, realizing that in the case of any conflict in the evidence the burden of proof, in the sense of the risk of nonpersuasion, was on the plaintiff.

The next issue, then, is really the extent to which such limitations of liability and right to declare increased value for a fee, must be brought home to bailors when the contract is made. As to warehousemen, the technique used in the Code was one of supplying a post-contract grace period for a unilateral modification after responsible people read the contract.

241. 563 F. Supp. at 414, 36 U.C.C. Rep. Serv. at 936-37. Judge Pollak referred to Note, *Survey of New York Law of 1980*, 55 St. John's L. Rev. 203, 209-10, as also expressing some doubts about the merit of the decision from an analytic point of view.

Professor Leary has a recollection (subject to the inaccuracies of 30-year-old recollections) that the optional language, contained in the 1954 Supplement No. 1 approved by the Permanent Editorial Board, was added in response to a fear that the warehousemen's and carriers' lobbies could, in many states, defeat the enactment of the Code if the optional language, based on pre-Code authority, was not available. The optional language reflected federal cases under the federal act and the common law as well as one side of a pre-Code split of authority.

242. 563 F. Supp. at 414, 36 U.C.C. Rep. Serv. at 937 (citing Note, 55 St. John's L. Rev. 203, 209-10 (1980)).

243. U.C.C. § 7-204(2) (1978) contains the following proviso:

provided, however, that such liability may on written request of the bailor at the time of signing such storage agreement or within a reasonable time after receipt of the warehouse receipt be increased on part or on all of the goods thereunder, in which event increased rates may be charged based on such increased valuation, but that no such increase shall be permitted contrary to a lawful limitation of liability contained in the warehousemen's tariff, if any.

The same limitation of liability for negligence, but not for "conversion to his own use," is set forth for carriers in U.C.C. section 7-309, but with significantly different limitations. The carriers' rates must be based on value, the tariff must afford an opportunity to declare a different value, or if there is no tariff, the bailor is "otherwise advised" of the opportunity to obtain a higher value.

The "otherwise advised" issue came before the Louisiana Court of Appeals in *Gulf South Bank & Trust Co. v. Purolator Armored, Inc.*<sup>244</sup> The bank had a standing contract with Purolator to transport currency from the bank to a Navy support office and port of embarkation near New Orleans with a clause which limited Purolator's liability to a maximum of \$40,000 per shipment. No tariff was made available by attachment to the contract or other publication and the branch manager from Purolator in New Orleans testified that neither he nor anyone working in his office ever advised the bank of an opportunity to increase the limits.

In litigation were two shipments aggregating \$150,000. The van carrying them had a newly hired guard riding in the rear who, when the vehicle stopped at a traffic light, skipped out with the money and was never found. He was hired without verification of statements in his application as to name, social security number, and references. This was found to be negligent as the missing guard had, in fact, a bad record.

Without making any finding as to whether under Louisiana law a carrier such as Purolator could by contract avoid liability for negligence,<sup>245</sup> the court affirmed a trial-court judgment for the bank in the amount of \$150,000 on the ground that Purolator had not complied with the necessary preconditions of U.C.C. section 7-309. Depending on the common sense of the bank to inquire did not satisfy the Code. The court declined to outline the procedures that would.

In *Griffin v. Nationwide Moving & Storage Co.*,<sup>246</sup> the Connecticut court had before it a case involving storage receipts before the adoption of the U.C.C. by Connecticut. Stating that the Code was declaratory of the common law, the court ruled that the warehouseman had not effectively overcome the presumption of negligence and that at common law a warehouseman, to secure a limitation of liability, must prove either actual knowledge of the limitation on the part of the bailor or facts giving rise to a justifiable belief on the part of the warehouseman that the bailor had such knowledge. There may be a need for some statement in the Code of the minimum requirements for bringing the available options for higher value home to those contracting for storage. Perhaps

244. 425 So. 2d 961, 36 U.C.C. Rep. Serv. (Callaghan) 275 (La. Ct. App. 1983).

245. U.C.C. § 7-309(1), imposing a reasonable care standard, contains the following sentence not found in U.C.C. § 7-204: "This subsection does not repeal or change any law or rule of law which imposes liability upon a common carrier for damages not caused by its negligence."

Apparently, pre-Code Louisiana law provided a rule of strict liability for bailees for hire. See La. Civ. Code Ann. arts. 2751, 2754 and 2937-2957; *Avant v. A-1 Moving & Storage Co.*, 260 So. 2d 355 (La. Ct. App. 1972), as cited in the instant case.

246. 446 A.2d 799, 34 U.C.C. Rep. Serv. (Callaghan) 970 (Conn. 1982).

it was the absence of such protective provisions that motivated the New York Court of Appeals decision in *I.C.C. Metals, Inc. v. Municipal Warehouse Co.*,<sup>247</sup> although a consumer case would have provided a more suitable vehicle.<sup>248</sup>

## CONFLICTING CLAIMS

Conflicting claims against a warehouseman often produce interesting situations. In *Northwestern National Sales, Inc. v. Commercial Cold Storage, Inc.*<sup>249</sup> Northwestern had sold a truckload of frozen beef to American International Meat Importers on credit. The beef was then stored with Commercial. On hearing that American had ceased paying its creditors, Northwestern, within ten days, made a U.C.C. section 2-702(2) demand for reclamation with a copy to Commercial, and filed a garnishment action against American as defendant and with Commercial as garnishee. Commercial refused to deliver the beef to Northwestern. American then filed under chapter 11 of the Bankruptcy Act. Fourteen days after the delivery to Commercial, the bankruptcy judge directed all warehousemen to deliver to American free of claims of all third parties. Commercial complied, whereupon Northwestern sued in conversion, based on its U.C.C. section 2-702(2) demand and failure to deliver. The Georgia Appeals Court held that a temporary failure to deliver when there were conflicting claims, pending a proper resolution thereof, did not constitute a conversion under U.C.C. section 7-603.

A failure to deliver on demand to a party who, after protracted litigation, was held to be entitled to delivery was itself held, in *Corrigan Dispatch Co. v. Casa Guznian, S.A.*,<sup>250</sup> not to constitute a conversion. In view of a certain lack of coordination between U.C.C. sections 7-403(1) and 7-603, the court indicated that where a prompt filing of an interpleader action followed conflicting claims, the threat of vexatious litigation constituted either a "personal defense" under U.C.C. section 7-403(1)(f), or an "other lawful excuse" under U.C.C. section 7-403(1)(g). Since U.C.C. section 7-603 specifically excuses delivery when there is a factual conflict as to entitlement, it would seem that its provisions override U.C.C. section 7-403, the preamble whereof makes entitlement a prerequisite. Preferable would be a wording of U.C.C. section 7-403(1) stating "Except as provided in Section 7-603." Strictly speaking, the excuses listed are grammatically required to be excuses against a person entitled to delivery, not against one whose entitlement is clouded but later established.

Finally we note that in *Hughes v. Accredited Movers, Inc.*,<sup>251</sup> the New Jersey Superior Court, Appellate Division, joined other courts in requiring strict compliance with the detailed requirements of U.C.C. section 7-210(2), governing sale in foreclosure of a warehouseman's lien, despite a finding of

247. 409 N.E.2d 849, 29 U.C.C. Rep. Serv. (Callaghan) 217 (1980).

248. Cf. *Klar v. H. & M. Parcel Room, Inc.*, 73 N.E.2d 912 (1947).

249. 293 S.E.2d 30, 34 U.C.C. Rep. Serv. (Callaghan) 669 (Ga. Ct. App. 1982).

250. 696 F.2d 359, 35 U.C.C. Rep. Serv. (Callaghan) 589 (5th Cir. 1983).

251. 461 A.2d 1203, 36 U.C.C. Rep. Serv. (Callaghan) 938 (N.J. Super. Ct. App. Div. 1983).

substantial compliance by the warehouseman and no prejudice to the bailor of household goods.